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# WHAT DOES THE SECOND AMENDMENT MEAN TODAY?

MICHAEL C. DORF\*

## INTRODUCTION

A growing body of scholarship argues that the Second Amendment protects a right of individuals to possess firearms, regardless of whether those individuals are organized in state militias.<sup>1</sup> Proponents of the individual right view<sup>2</sup> do not merely disagree with those who champion the competing view that the Second Amendment poses few if any obstacles to most forms of gun control legislation by the state or federal governments. Judged by the titles of their writings, many of the individual right scholars appear to believe that the Second Amendment has been subject to uniquely shabby treatment by the courts and, until recently, academic commentators. For example, Sanford Levinson titles an important essay *The Embarrassing Second Amendment*,<sup>3</sup> thereby suggesting that any interpretation less robust than the one favored by the National Rifle Association (“NRA”) must be the product of result-oriented scholarship. The Second Amendment, Levinson implies, protects an individual right to own guns, and that is embarrassing to liberals (like him) who favor gun control. In the same vein, Eugene Volokh titles a

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1. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 897 n.211 (3d ed. 1999).

2. The individual right scholars sometimes refer to their position as the “standard model,” thereby suggesting that other views are idiosyncratic. See Michael A. Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 CONST. COMMENTARY 247, 249 (1999) (criticizing the use of such terminology in Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995)). This Article uses a somewhat more neutral terminology.

3. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

recent essay *The Amazing Vanishing Second Amendment*.<sup>4</sup> Volokh argues that the interpretive moves that have been used to restrict the Second Amendment's scope are unprincipled because they would be unacceptable in other contexts.<sup>5</sup> Similar claims permeate the individual right literature.<sup>6</sup>

This Article argues that the Second Amendment has not been unfairly orphaned. The courts and commentators that reject the individual right scholars' claims are justified in doing so by the application of the same criteria of interpretation commonly applied to other constitutional provisions. A nonexclusive list of the relevant factors includes: doctrine, text, original understanding, structural inference, postadoption history, and normative considerations.<sup>7</sup>

Champions of the individual right interpretation of the Second Amendment may believe that these criteria are wrongheaded or illegitimate in all contexts. For example, many individual right scholars appear to believe that original meaning is the sole criterion of constitutional interpretation.<sup>8</sup> But if that is their premise, they cannot contend that nonoriginalist interpretation of the Second Amendment is anything like a *unique* mistake. Many of the foundational doctrines of our current constitutional regime do not comport with the original understanding of the Constitution or its amendments. The requirement of equal population apportionment for state legislative districts, the invalidity of *de jure* racial segregation, and the breadth of federal power under the Commerce Clause (even after the recent federalism decisions) are all at odds with the dominant understandings of those who adopted the relevant constitutional provisions. Original understanding is not the sole, nor

4. Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998).

5. See *id.* at 840; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 805-06 (1998).

6. See, e.g., Brannon P. Denning, *Gun Shy: The Second Amendment As an "Underenforced Constitutional Norm"*, 21 HARV. J.L. & PUB. POL'Y 719 (1998); Dan Polsby, *Treating the Second Amendment Like Normal Constitutional Law*, REASON, Mar. 1996, at 32.

7. My list overlaps substantially with those of other scholars. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 8-9 (1991); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987). For sympathetic accounts of eclectic approaches to constitutional interpretation, see Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 35 (1990).

8. See, e.g., JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 176 (1994). One notable exception is L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997).

even the principal, measure of a constitutional interpretation's correctness.<sup>9</sup> If the individual right interpretation of the Second Amendment rests on contrary premises, its scholars must persuade us to abandon much more than gun control.

This Article proceeds in six parts. Parts I through V parse the criteria of constitutional interpretation identified above. For clarity of presentation, I treat these factors one at a time, but they are of course interrelated.<sup>10</sup> In the end, a satisfying interpretation is not so much one that earns the highest composite score on the relevant factors, nor even one that prevails in a trumping category, but one that best hangs together.<sup>11</sup> Deciding which interpretation best hangs together admittedly requires a somewhat subjective judgment, and those who favor gun control as a policy matter are likely to be more sympathetic to the interpretation I offer than are those who oppose it. But under any plausible approach to legal interpretation, an individual interpreter's policy views will have some positive correlation with her interpretive views.<sup>12</sup>

It has become customary to contrast the individual right view of the Second Amendment with what is often called the "collective

9. Although I would reject originalism on normative grounds, I mean the statement in the text only as a descriptive claim. Even those who are committed to the original understanding on legitimacy grounds must recognize the large role that nonoriginalist precedents play in our constitutional order. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727-39 (1988). As two of the other articles in this Symposium ably demonstrate, the originalist arguments in favor of the individual right interpretation of the Second Amendment exemplify the problems of originalism. See Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167 (2000) (emphasizing the dead-hand problem and the difficulty of discerning constitutional meaning through the mists of time); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000) (describing the thin evidence for many of the historical claims of individual right scholars).

10. Original understanding and structural inference are so intertwined that I consider them together.

11. Fallon makes the important point that constitutional interpreters strive to make various forms of argument cohere with one another, see Fallon, *supra* note 7, at 1240-43, but errs when he proposes a hierarchy for cases in which coherence cannot be achieved. See *id.* at 1243-46. In my view, no all-purpose hierarchy can be justified or even located in existing practice. See Dorf, *supra* note 7, at 1794; Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 607-09 (1999).

12. Perhaps for this reason, individual right scholars count it as a victory when otherwise "liberal" scholars such as Sanford Levinson or Laurence Tribe endorse the "conservative" position. As Robert Spitzer notes in his contribution to this Symposium, however, that reaction is a kind of inverse *ad hominem* argument; it looks to who makes the arguments rather than what they argue. See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000). Moreover, it is hardly obvious that opposition to gun control is a conservative position, given that liberals generally oppose limits on civil liberties. See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 3-5 (1991).

right” interpretation.<sup>13</sup> Under the latter, the Second Amendment protects some right of state militias against undue federal interference but no right of individuals against either federal or state regulation.<sup>14</sup> This Article is sympathetic to the collective right view but acknowledges that the Second Amendment is and has always been somewhat puzzling. Motivated in large measure by the founders’ distrust of standing armies, even on the broadest reading, the Second Amendment does nothing to prevent the federal government from maintaining a standing army. So too, the right of insurrection that is sometimes offered as a normative justification for a right to possess firearms has been emphatically rejected by our constitutional history. When *individuals* attempted to exercise a right to rebel during the Whiskey Rebellion of 1794, President Washington called forth the militia (the institution at the heart of the Second Amendment) to suppress the rebels. The only serious attempt by the *states* to exercise a right of rebellion led to the Civil War.

The conclusion of Parts I through V, therefore, is that the Second Amendment is probably best read to prevent the federal government from abolishing state militias. Part VI considers the objection that even if such a prohibition made sense in the eighteenth century, it does not make sense today. There is a canon of statutory construction requiring that every word of a statute be given some effect<sup>15</sup> and an apparent parallel canon in constitutional law.<sup>16</sup> Thus, the objection continues, in the modern world, the individual right interpretation is necessary to give some operative content to the Second Amendment. Part VI responds to this objection by denying that there is anything especially anomalous about a doctrine that renders a constitutional provision largely pointless in modern times. For those readers who nonetheless are uncomfortable with a superfluous constitutional provision, Part VI then suggests three alternative interpretations of the Second Amendment, none of which would stand as a barrier to effective gun control. Each approach has

13. See, e.g., Keith A. Erhman & Dennis A. Hennigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 57-58 (1989); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 888-89 (1996).

14. See Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL’Y REV. 488, 504 (1992); Erhman & Hennigan, *supra* note 13, at 57.

15. See WILLIAM D. POPKIN, MATERIALS ON LEGISLATION 276 (2d ed. 1997). For an example, see *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 257-58 (1993).

16. See, e.g., *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816) (“[U]nless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect . . .”).

its difficulties, but then, as I argue throughout, that is likely to be true of any interpretation of the puzzling Second Amendment.

## I. DOCTRINE

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Although eclectic interpretive theories customarily list authoritative text as the first consideration in ascertaining meaning,<sup>17</sup> I shall defer consideration of the Second Amendment’s text as such until Part II. I do so, not simply because the Second Amendment lacks a “plain meaning,” but because, contrary to conventional wisdom, constitutional doctrine typically trumps constitutional text—at least absent arguments of sufficient strength to overcome the principle of *stare decisis*.<sup>18</sup> For example, there is a familiar and powerful textual argument that the Fourteenth Amendment’s prohibition on state deprivations of liberty without due process implicitly authorizes such deprivations where adequate procedures are followed.<sup>19</sup> Yet even the staunchest critics of particular doctrines adopted in the name of “substantive due process” would not so limit the clause; at a minimum, they accept that the Fourteenth Amendment has the substantive effect of incorporating most of the Bill of Rights against the states.<sup>20</sup> An argument that, say, the First Amendment poses no obstacle to a state imposing viewpoint-based regulations on speech would face an insurmountable doctrinal hurdle. Similarly, references in the case law to “the dormant Commerce Clause”<sup>21</sup> suggest that there is an express provision of the Constitution restricting the states’ ability to enact

17. See Fallon, *supra* note 7, at 1195-98.

18. See Monaghan, *supra* note 9, at 744 (“[S]tare decisis plays a very large role in constitutional law.”). For accounts of constitutional interpretation that give primacy to doctrine, see Richard H. Fallon, Jr., *The Supreme Court, 1996 Term: Foreword: Implementing The Constitution*, 111 HARV. L. REV. 54 (1997); David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

19. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (“[S]ubstantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”). For a useful account of the antebellum (and older) roots of what has come to be called substantive due process, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARY 315 (1999).

20. Justice Scalia, for example, does not merely grudgingly accept the applicability of free speech limits on the states; he has actively and enthusiastically extended them. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (Scalia, J.) (invalidating a city ordinance that drew content-based distinctions within the category of fighting words).

21. See, e.g., *Camps Newfound/Owatonna, Inc. v. Harrison*, 520 U.S. 564, 575 (1997) (enforcing “the strictures of the dormant Commerce Clause”).

discriminatory or unduly burdensome regulations of interstate commerce, when the text of Article I, Section 8, Clause 3 appears to be nothing more than a grant of power to Congress. Numerous other examples could be adduced in which sound textual arguments would stand no realistic chance of prevailing because of contrary doctrine. Therefore, it is appropriate in interpreting the Second Amendment or any constitutional provision to begin with doctrine rather than text.<sup>22</sup> Let us turn, then, to the cases.

The Supreme Court has never upheld an individual's Second Amendment objection to prosecution under a law regulating firearms. Two nineteenth-century decisions, *United States v. Cruikshank*<sup>23</sup> and *Presser v. Illinois*,<sup>24</sup> held that the Second Amendment does not apply to the states.<sup>25</sup> Although these decisions postdated the enactment of the Fourteenth Amendment, they predated the modern cases holding that the Fourteenth Amendment incorporates most of the provisions of the Bill of Rights. To the extent that *Cruikshank* and *Presser* simply rely on the subsequently rejected constitutional understanding of *Barron v. City of Baltimore*,<sup>26</sup> they might appropriately be reexamined. This does not, of course, mean that the Second Amendment necessarily applies to the states. Upon reexamination, we might conclude, for example, that the Second Amendment prohibits the federal government from asserting some measure of control over state units of the National Guard; such a limit on the federal government for the benefit of the states could not readily be applied against the states. On the other hand, if the Second Amendment protects a right of individual firearm ownership against federal interference, there would be no analytical difficulty in applying a parallel limit against the states.

The leading case involving the Second Amendment as a limit on

22. I make this point as a practitioner of Supreme Court-focused constitutional law attempting to answer the question, "What legal effect should be given to the Second Amendment?" One might criticize the Supreme Court's practice of elevating precedent over text on any number of grounds, but none of them would be peculiar to the Second Amendment, and therefore I treat them as outside the scope of this Article. I also put to one side interpretive approaches that aim to guide decision makers who are at liberty to ignore judicial practice. For an example, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

23. 92 U.S. 542 (1875).

24. 116 U.S. 252 (1886).

25. See *Cruikshank*, 92 U.S. at 553; *Presser*, 116 U.S. at 265.

26. 32 U.S. (7 Pet.) 243 (1833) (holding the Fifth Amendment's Takings Clause, and the Bill of Rights more generally, inapplicable to actions undertaken by state government).

federal action is *United States v. Miller*.<sup>27</sup> There the Court rejected the claim that the Second Amendment protected a private right to possess a sawed-off shotgun because there was no evidence that such possession bore “some reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>28</sup>

The individual right advocates correctly point out that *Miller* might plausibly be read to suggest a negative pregnant: “if the sawed-off shotgun had been a militia weapon, then,” on this reading, the defendants “would have had a constitutional right to possess it.”<sup>29</sup> By further implication, in general, individuals would have a Second Amendment right to private possession of whatever weapons might be useful in military service. *Miller* does, after all, describe with approval state statutes in force at the time of the adoption of the federal Constitution organizing militias out of the (adult white male) citizens, who (according to the statutes) were to bring their own weapons when called to muster.<sup>30</sup> When not called to muster, the argument goes, the people are entitled to, in the terms of the Second Amendment, “keep” their weapons.

*Miller* itself does not exclude this possibility; but neither does *Miller* compel it.<sup>31</sup> Indeed, we extrapolate from the logic of *Miller* at our peril, because, under modern conditions, it would seem to grant the most constitutional protection to just those weapons that are least suitable to private possession—distinctly military “arms” such as tanks, attack helicopters, rocket launchers, or even nuclear weapons.<sup>32</sup>

More importantly, the Supreme Court has not read *Miller* to imply anything resembling an individual right to firearms possession. For example, in a 1980 case, *Lewis v. United States*,<sup>33</sup> the Court upheld a federal statute prohibiting a convicted felon from possessing

27. 307 U.S. 174 (1939).

28. *Id.* at 177.

29. Eugene Volokh et al., *The Second Amendment As a Teaching Tool in Constitutional Law Classes*, 48 J. LEGAL EDUC. 591, 595 (1998) (asking, somewhat rhetorically, whether this is not the best reading of *Miller*).

30. See *Miller*, 307 U.S. at 180-82 (quoting Massachusetts, New York, and Virginia statutes).

31. For a useful analysis of the opacity of *Miller*, see Powe, *supra* note 8, at 1326-32.

32. See Erwin Griswold, *Phantom Second Amendment “Rights”*, WASH. POST, Nov. 4, 1990, at C-7. Robert Spitzer makes this point as well, see ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 33 (2d ed. 1998), but he apparently misapprehends the individual right scholars’ argument when he adds that inferring a negative pregnant from *Miller* “is foolish on its face . . . because sawed-off shotguns can and do have some military value.” *Id.* That may be true, but plainly the *Miller* Court thought otherwise, and the individual right scholars’ argument turns on what the *Miller* Court’s premises were, not whether those premises were correct.

33. 445 U.S. 55 (1980).



firearms. If the Court had been interested in safeguarding an individual right of firearms possession for law-abiding citizens, the Court could have relied on the fact that prohibitions on firearms possession by felons date back to colonial times.<sup>34</sup> Yet the *Lewis* Court went considerably further in undermining constitutional protection for an individual right. It cited *Miller* for the proposition that the statute at issue did not “trench upon any constitutionally protected liberties.”<sup>35</sup>

Or consider *Adams v. Williams*, which rejected a Fourth Amendment challenge to a “stop-and-frisk” based on an informant’s tip that the defendant was in illegal possession of narcotics and a handgun.<sup>36</sup> Dissenting, Justice Douglas, joined by Justice Marshall, argued that the danger to the police in street encounters with suspects stemmed not from the niceties of the Fourth Amendment, but from the state’s failure to enact strict gun control laws. Citing *Miller*, Justice Douglas opined that “[t]here is no reason why all pistols should not be barred to everyone except the police.”<sup>37</sup> No member of the Court took issue with this statement.<sup>38</sup>

These decisions suggest that, without directly facing the question, the Supreme Court has come to understand *Miller* as standing roughly for the collective right view of the Second Amendment.<sup>39</sup> With one recent exception, the lower federal courts have also understood *Miller* this way.<sup>40</sup> As a matter of doctrine, the most that can be said for reading the Second Amendment to confer an

34. See *TRIBE*, *supra* note 1, at 902-03.

35. *Lewis*, 445 U.S. at 65 n.8.

36. 407 U.S. 143 (1972).

37. *Id.* at 150 (Douglas, J., dissenting).

38. But see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (equating “the people” of the First, Second, Third, Fourth, Ninth, and Tenth Amendments as well as the Preamble); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (including “the right to keep and bear arms” in a catalogue of individual rights).

39. See also *Burton v. Sills*, 394 U.S. 812 (1969) (dismissing appeal for want of a federal question, where the New Jersey Supreme Court read *Miller* to stand for the proposition that the federal government “may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militias of the states,” *Burton v. Sills*, 248 A.2d 521, 527 (N.J. 1968)).

40. See *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (“Consulting the text and history of the Amendment, the Court [in *Miller*] found that the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia.”); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than an individual, right.”); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (“Since the *Miller* decision, no federal court has found any individual’s possession of a military weapon to be reasonably related to a well regulated militia.”) (internal quotations omitted). The exception is *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999).

individual right to own and carry firearms is that constitutional doctrine does not pose an insuperable obstacle to that reading, although its adoption would mark a substantial change in the prevailing view, and presumably would have to satisfy the criteria ordinarily thought to justify such a change.<sup>41</sup>

Before moving to textual arguments, I should consider an objection to the conclusion that current doctrine stands against the individual right view: *Miller* did not actually hold that the Second Amendment protects no individual right to firearms possession, so cases or individual opinions treating *Miller* as if it did are not entitled to the weight of precedent. This is not a trivial objection; however, and this is the point I wish to emphasize, the objection applies to much more than Second Amendment jurisprudence. For example, much of the rationale for the Supreme Court's decision in *Brown v. Board of Education*<sup>42</sup> rested on an examination of the harms caused by racial segregation in *education*;<sup>43</sup> yet the Court, without explanation, rapidly applied *Brown* to invalidate racial segregation in a wide variety of other contexts.<sup>44</sup>

Nor has this process of precedent-setting without judicial opinion been confined to the *expansion* of individual rights. As in the interpretation of the Second Amendment, so too have First Amendment rights been *restricted* to less than they might have been by somewhat unreflective citation. For example, current First Amendment law affords less protection to labor picketing than to otherwise comparable speech outside the labor context.<sup>45</sup> The difference in treatment is essentially a historical legacy: labor decisions predating modern free speech doctrine continue to be cited as good law, and for that reason, remain good law.<sup>46</sup> Furthermore, and more broadly, as Justice Kennedy has noted, even the now-

41. One may think, as I do, that the Supreme Court overstates the force of precedent in constitutional law in *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992), but there is near-universal acknowledgment that a departure from existing constitutional understandings requires some greater justification than the naked belief that those understandings are mistaken.

42. 347 U.S. 483 (1954).

43. See *id.* at 489-95.

44. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (invalidating racial segregation in public transportation); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *City of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

45. See James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950-53 (1999).

46. See, e.g., *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607, 616 (1980) (rejecting a First Amendment challenge to a prohibition on secondary boycotts).

canonical view that content-based regulation of speech can be justified if the government satisfies the compelling interest test came into being by a series of sloppy citations.<sup>47</sup> Yet despite his well-documented protest, Justice Kennedy convinced none of his colleagues to reexamine the test.

These examples illustrate a quite basic point that the objection under consideration ignores: the force of doctrine qua doctrine does not rest on how it came into being any more than it rests upon the soundness of the arguments that can be advanced for it. The main point of following precedent is to follow it when there is a plausible argument that it is wrong. There are, of course, occasions when constitutional precedents are abandoned because they are very clearly wrong or because they have become unworkable, and some (including me) have argued that the Supreme Court should be willing to reexamine its precedents more frequently than it does.<sup>48</sup> But as a matter of doctrine understood in the conventional way, the case for the individual right view of the Second Amendment remains a very weak one. To put the matter in lawyerly terms, champions of the individual right view of the Second Amendment must satisfy a heavy burden of persuasion. They must make an overwhelming rather than a just barely convincing case for their view. Turning to the remaining criteria of constitutional interpretation, we will see that this is a tall order.

## II. TEXT

Recall the text of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The preamble is arresting. Only one other operative provision of the Constitution contains anything resembling it. Article I, Section 8, Clause 8 gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." What are we to make of such preambles? One answer would be to treat them as purely hortatory. But even if one believes (as I do not) that, in general, the interpretation of authoritative text should proceed

47. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-27 (1991) (Kennedy, J., concurring).

48. See, e.g., Michael C. Dorf, *The Supreme Court 1997 Term, Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60-73 (1998).

without any consideration of the background purposes of its adopters, surely that principle of construction does not apply when the lawmakers have stated their purpose in equally authoritative text. The Second Amendment's preamble is no scrap of legislative history taken from a largely overlooked committee report or poorly attended floor debate. It is part of the Constitution and should therefore inform our understanding of the rest of the sentence of which it is a part.

The Preamble to the Constitution as a whole provides a useful parallel. Although it creates no judicially enforceable rights or duties directly, the Preamble has been used, quite appropriately, to shed light on the meaning of other judicially enforceable provisions.<sup>49</sup> I am suggesting that a similar use should be made of the Second Amendment's preamble—and, although this is beyond the scope of this Article, the preamble to the Copyright and Patent Clause as well. To the extent that we are unsure what a right to keep and bear arms entails, the Second Amendment's preamble provides guidance.

The relevance of the Second Amendment's preamble to its meaning would seem so obvious as not to need justifying were it not for academic efforts to minimize its weight.<sup>50</sup> For example, Volokh points out that provisions of state constitutions of the founding era commonly contained preambles of the sort we see in the federal Constitution's Second Amendment. Those provisions involved not only the right to bear arms, but a diverse collection of other rights, including freedom of speech and the press, the right to trial by a local jury, and many more.<sup>51</sup> Volokh draws two inferences from the existence of these provisions: first, the framers' decision to include a preamble in the Second Amendment was mere stylistic happenstance, to which virtually no significance can be attributed.<sup>52</sup> Second, reading the contemporaneous state constitutional provisions alongside the Second Amendment drives home the lesson that even when a constitutional provision's operative clause is over or under inclusive

49. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 n.31 (1995) (relying on the fact that the Preamble invokes the authority of "the People of the United States," rather than that of the delegates of the several states). See generally Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 *CARDOZO L. REV.* 117 (1990).

50. See Reynolds, *supra* note 2, at 466-67; William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *DUKE L.J.* 1236, 1242 (1994).

51. See Volokh, *supra* note 5, at 794-95, 814-21.

52. See *id.* at 796 ("[T]he Second Amendment is just one of many constitutional provisions that happen to be structured this way.").

with respect to its justification clause, it is still the operative clause, and not the justification clause, that controls.<sup>53</sup> Although we might not think “that entirely unfettered freedom of speech in the legislature”<sup>54</sup> is, in the words of the justification clauses of the Speech and Debate Articles of the Massachusetts, New Hampshire, and Vermont constitutions, “essential to the rights of the people,”<sup>55</sup> we would nonetheless be obliged to give full effect to the operative language of those provisions. Volokh argues for similar treatment for the Second Amendment: even if we no longer believe that “A well regulated Militia” is “necessary to the security of a free State,” we nonetheless must respect “the right of the people to keep and bear Arms.”

Although I agree with the overall thrust of Volokh’s argument, it does not, in my view, carry us very far in the direction of the individual right interpretation of the Second Amendment. I should begin by noting my substantial disagreement with Volokh’s first inference. As a matter of *textual* interpretation of the Second Amendment, it is largely irrelevant that clause preambles are commonplace in *other* documents. In the United States Constitution, the inclusion of a preamble marks the Second Amendment as extraordinary. The frequent use of clause preambles in contemporaneous documents does, I concede, shed some light on the subjective intent of those who drafted the Second Amendment as well as, perhaps, the most common understanding of the political community at the time. However—and here Volokh’s second argument undermines his first—it is the text itself, not the subjective intent of the drafters nor even the background understanding of the time, that was enacted. In the case of the Second Amendment as it appears in the federal Constitution, that text is striking for containing its own preamble.

I do not read Volokh as ultimately disagreeing. He says: “To the extent the operative clause is ambiguous, the justification clause may inform our interpretation of it, but the justification clause can’t take away what the operative clause provides.”<sup>56</sup> I agree, as, apparently, does David Williams—one of the principal champions of the

53. See *id.* at 801-07.

54. *Id.* at 799.

55. See MASS. CONST. pt. I, art XXI (1780); N.H. CONST. pt. I, art. XXX (1784); VT. CONST. ch. I, art. XVI (1786).

56. Volokh, *supra* note 5, at 805.

collective right interpretation of the Second Amendment.<sup>57</sup> The real disagreement between Volokh, on the one hand, and Williams and myself, on the other hand, has nothing to do with the general function of clause preambles; instead, we disagree over whether the operative clause standing alone is ambiguous. In my view, protecting a “right of the people to keep and bear Arms” is a sufficiently odd way of protecting an individual right to possess firearms for rebellion, self-defense, or hunting as to provoke further inquiry.

As I note in the next Part, at the time of the founding, the phrase “bear arms” was most commonly used in a military setting,<sup>58</sup> and even today it carries a military connotation. This is not to say that people do not use the phrase to refer to individual firearm possession—they do. However, many of the people who use the term that way do so for a distinctly political purpose: they aim to associate the language of the Second Amendment with private firearms possession for rebellion, self-defense, or hunting. For example, the home page of the NRA touts all that the organization does for “your Second Amendment right to keep and bear arms.”<sup>59</sup> The political import of this use of the Second Amendment’s language is difficult to miss. By repeatedly associating the Second Amendment’s language with its own political aims, the organization increases the likelihood that, over time, the language will simply come to be synonymous with those aims.

A strict originalist would object that, to the extent that the NRA uses the words of the Second Amendment to mean something different from their common understanding in 1791, the new usage should have no bearing on authoritative constitutional interpretation. However, I am not a strict originalist and would therefore eschew this objection. Abolitionists were fully entitled to invoke the Declaration’s statement that “[a]ll men are created equal” in pursuit of ends that its drafters would have rejected.<sup>60</sup> Even without accompanying changes in constitutional text, constitutional change

57. See David C. Williams, *Response: The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822, 824 (1998) (“Rather than using the purpose clause to trump the operative clause, I have sought to interpret the latter in light of the former, so that there is no tension between the two.”).

58. See *infra* text accompanying notes 110-14.

59. Wayne LaPierre, *NRA Homepage* (visited Dec. 22, 1999) <<http://www.nra.org>> (statement of Wayne LaPierre, Executive Vice President).

60. See J.M. Balkin, *Agreements with Hell and Other Objects of our Faith*, 65 FORDHAM L. REV. 1703, 1716 n.28 (1997) (discussing Frederick Douglass’s contention that the Constitution should be read in light of the Declaration). For the contrary, canonical ante-bellum view, see *State v. Post*, 20 N.J.L. 368, 375-76 (1845).

can legitimately come about because of a political struggle that aims to capture hearts and minds through language.<sup>61</sup>

Therefore, I do not question the legitimacy of the NRA's efforts to tie the language of the Second Amendment to its political agenda. Should those efforts succeed, and should the language of the Second Amendment widely come to be understood as synonymous with a right to private possession of firearms for rebellion, self-defense, or hunting, the plain meaning argument for that interpretation would be accordingly strengthened. However, and this is the critical point, the NRA has not (yet) won its battle. The meaning of "the right to keep and bear arms" remains hotly contested in a way that other formerly contested questions of constitutional meaning—such as whether the most blatant forms of sex discrimination deny the equal protection of the laws—do not.<sup>62</sup> For the time being at least, for a large number of reasonable interpreters, perhaps a majority, the phrase "keep and bear arms" is a sufficiently awkward way to protect a right of armed rebellion, self-defense, or hunting to warrant a search for some alternative interpretation.

Yet, considered in the light of twenty-first-century conditions and sensibilities, the Second Amendment is baffling. What exactly is the militia, and how does protecting a right to keep and bear arms contribute to a "well-regulated" one? We are accustomed to thinking that rights act to impede rather than to further government regulation. Perhaps the answer is that "the people" who have a right to keep and bear arms are the people in a collective capacity,<sup>63</sup> so that the right at stake is, at least in substantial measure, what Benjamin Constant famously called a "liberty of the ancients"—a collective right of self-governance—rather than a "liberty of the moderns"—a right against the government.<sup>64</sup> But if this is so, the individual right

61. Gary Wills argues that President Lincoln's Gettysburg Address accomplished just such a transformation. See GARY WILLS, *LINCOLN AT GETTYSBURG* (1992).

62. See Lawrence Lessig, *Response: The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1845-46 (1997) (discussing the relevance to constitutional interpretation of changed attitudes regarding sex discrimination); see also Michael C. Dorf, *Reply: Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1867-68 (1997) (replying to Lessig's claim that I offer normative claims as if they were factual ones).

63. See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 577-78 (1991) (noting the founders' "rhetorical identification" of the militia, and by implication, the people, "with the whole of the citizenry"); Williams, *supra* note 57, at 824 (reading "'People' to mean the Body of the People").

64. See BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns* (1819), in BENJAMIN CONSTANT, *POLITICAL WRITINGS* 297, 307 (Biancamaria Fontana ed. & trans., 1988).

scholars like to ask, how do we account for the fact that other provisions of the Bill of Rights, which we understand as rights against the government, use the very same term, “the people?”<sup>65</sup>

The short answer is that the Constitution was the product of human hands and, therefore, there would be nothing particularly odd if it used the same word to mean different things in different contexts: to assume otherwise is to commit “the fallacy of *hyper-integration*—of treating the Constitution as a kind of seamless web.”<sup>66</sup> Nonetheless, individual right scholars pursue just this course.

Many individual right scholars also say that the militia and the people are one and the same.<sup>67</sup> This equation, however, proves to be enormously embarrassing. If the “people” of the Second Amendment are the same “people” we encounter elsewhere in the Constitution, then the “militia” of the Second Amendment must also be the “militia” of Articles I and II, and individual right scholars indeed assume as much.<sup>68</sup> Yet *Perpich v. Dod*,<sup>69</sup> a unanimous 1990 ruling of the Supreme Court, treats the militia of Articles I and II as identical to Congress’s statutory definition of the militia.<sup>70</sup> That

65. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 51 (1998) (“[T]he people’ at the core of the Second Amendment are the same people at the heart of the Preamble and the First Amendment.”); MALCOLM, *supra* note 8, at 162; Volokh, *supra* note 5, at 802.

66. LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 25 (1991).

67. Individual right scholars like to quote [founding-era] statements equating the militia with the people, such as the following remark of George Mason: “Who are the militia? They consist now of the whole people . . . .” George Mason, *Virginia Debates on the Adoption of the Federal Constitution*, in 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, 367, 425 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1836). See, e.g., Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 77 n.91 (1995); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 216 n.51 (1983); Reynolds, *supra*, note 2, at 473. I note that these scholars rarely cite the remainder of Mason’s observation, which reveals that he understood near-universal militia service to be subject to legislative abolition, absent contrary language in the Constitution. See Mason, *supra*, at 425 (“I cannot say who will be the militia of the future day.”). Nor do they note that the debate from which this quotation is taken focused on the balance of power between the state and federal governments, *see id.* at 410-452, as Mason himself makes clear in his call for what eventually became the Tenth Amendment. See *id.* at 442 (“I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states.”).

68. This equation is implicit in individual right scholars’ reliance on statements like Mason’s, *see* MASON, *supra* note 67, at 425, as he was discussing the term “militia” as it appears in the original Constitution.

69. 496 U.S. 334 (1990).

70. I use the constitutional term “militia” here, as the *Perpich* Court did, to mean what the twentieth-century statutes have called the “reserve” or “unorganized” militia. See *id.* at 342; *see also* SPITZER, *supra* note 32, at 29.



statutory definition expressly excludes women who are not members of the National Guard and men who are not able-bodied and (unless they are former members of the regular armed forces who enlisted in the National Guard before they turned sixty-four) under forty-four years of age.<sup>71</sup> Thus, the individual right scholars' theory would deny a right to own or possess firearms to the disabled, to most women, to most middle-aged men, and to all older Americans. Worse still, because the militia of Articles I and II equals the militia of the Second Amendment equals the people of the Second Amendment equals the people of the other provisions of the Constitution, *all constitutional liberties* would appear to be ruled out for these groups, which comprise a majority of the adult population.

How can the individual right scholars avoid these absurd implications? They might argue that *Perpich* is simply wrong, although they would face a stiff burden of persuasion in contesting a unanimous decision (authored by Justice Stevens, a Bronze Star Navy veteran) and a Congressional interpretation that has not changed significantly in nearly a century.<sup>72</sup> Alternatively, the individual right scholars could say that the militia and the people were thought to be synonymous in 1791 but the meaning of the terms has since diverged. Yet such an approach would explain *Perpich* by conceding that the meaning of words in the Second Amendment can change over time, a concession that would seem fatal for the more strongly originalist variants of the individual right theory.<sup>73</sup> We will see next how, even without this difficulty, the original understanding provides at best tenuous support for the individual right view.

### III. ORIGINAL UNDERSTANDING AND STRUCTURAL INFERENCE

Professional historians seem to enjoy chiding judges and legal academics for the way the latter employ historical material. The charge typically takes one or more of three forms. First, historians object to what they see as incompetence.<sup>74</sup> Second, they decry the

71. See 10 U.S.C. § 311(a) (1999); 32 U.S.C. § 313(a) (1999).

72. See *Perpich*, 496 U.S. at 342 n.11 (citing the Dick Act, 32 Stat. 775 (1903)). Indeed, as Spitzer shows, the movement away from defense by unorganized militia and towards defense by federal forces plus reserve forces organized by state was well under way early in the nineteenth century. See SPITZER, *supra* note 32, at 28-29.

73. This is not a failing of Amar's theory. As we shall see, his view that the Second Amendment protects an individual right to own and possess firearms critically depends on the idea that constitutional meaning changes over time. I find Amar's view unconvincing for somewhat different reasons. See *infra* text accompanying notes 159-178.

74. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95

pervasiveness of “law office history,” in which advocates “pick and choose facts and incidents ripped out of context that serve their purposes.”<sup>75</sup> Painful though they may be, these two criticisms are well taken: within the limits of what is possible for those whose concerns extend beyond historical inquiry for its own sake, no one would defend incompetent or biased work.<sup>76</sup>

The third common criticism is more problematic, however. Some historians—especially those who are not also lawyers—labor under the misimpression that constitutional interpretation aspires to recapture original meaning and nothing else, so that nonoriginalist decisions are, *ipso facto*, the product of incompetent historical understanding or illegitimate usurpation. For example, upon concluding that the founders intended the Second Amendment to protect a private right of armed self-defense and revolution, Joyce Malcolm asserts—without any discussion of nonhistorical forms of constitutional argument—that to take a different view of the Second Amendment in modern times is to engage in “misinterpretation.”<sup>77</sup> If we disagree with the founders’ views, as she understands them, the only legitimate path is constitutional amendment.<sup>78</sup> Daniel Lazare makes the identical move, although he is considerably less sanguine than Malcolm, both because he takes a dimmer view of the wisdom of an armed populace and because he acknowledges the near impossibility of securing a constitutional amendment.<sup>79</sup> Malcolm, Lazare, and many others writing in the field thus appear to be laboring under what James Fleming has aptly called the “originalist premise.”<sup>80</sup>

As I have argued at length elsewhere, the original understanding

COLUM. L. REV. 523, 527 (1995) (lamenting “that habits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing—pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution”); *id.* at 591 (urging constitutionalists “to do their basic homework”).

75. *Id.* at 554. Accord G. Edward White, *Reflections on the “Republican Revival”: Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994).

76. The qualification is important, however. See Cass Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995) (“[W]hat a constitutional lawyer finds from history may, for legitimate reasons relating to that purpose and that role, be quite different from what a historian finds there.”).

77. MALCOLM, *supra* note 8, at 176.

78. See *id.*

79. See Daniel Lazare, *Your Constitution Is Killing You*, HARPER’S, Oct. 1999, at 57. The argument is of a piece with Lazare’s recent book, which critiques a Constitution he simply equates with the original understanding. See DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* (1996).

80. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1344 (1997).

of very old provisions of the Constitution is relevant to modern interpretation, but not in the reductionist way that strict originalists and some historians commonly assume. The relevance of original understanding takes three principal forms. First, if phrases like “keep and bear arms” or

“well regulated Militia” ha[ve] no commonly accepted modern usage, a [modern] interpreter would first wish to discern [their] meaning in the eighteenth century and then to translate that meaning into modern English. [T]o the extent that *text* matters to the modern interpreter, it sometimes will be nearly impossible to make any sense out of the text without understanding an earlier historical context.<sup>81</sup>

Second, “we care about what the framers thought because, whether we like it or not, our own understanding has been shaped against the backdrop of theirs.”<sup>82</sup> And third, “we believe that the Founders of the Republic had insight into the problems of government which their handiwork addressed.”<sup>83</sup> I have referred to the second and third reasons for caring about the original understanding as *ancestral* and *heroic* originalism, respectively.<sup>84</sup> We clearly have sound reasons for studying the original understanding, although “[n]othing in this enterprise commits the modern reader to seeking or to following the intentions of the eighteenth-century adopters of the language.”<sup>85</sup> In this spirit, let us look to the original understanding of the Second Amendment.

A historian interested in unearthing the founders’ full views on the right to keep and bear arms would no doubt begin with the seventeenth-century English experience, culminating in the English Bill of Rights of 1689.<sup>86</sup> From this experience, Americans drew the Whig lesson that standing armies—a somewhat ambiguous idea even in the eighteenth century—posed a serious threat of tyranny.<sup>87</sup> They “also had firsthand experience with European military practices that reinforced political theory and identified the standing army in

81. Dorf, *supra* note 7, at 1797-98.

82. *Id.* at 1801.

83. *Id.*

84. *See id.*

85. *Id.* at 1797-98.

86. For an example of such a study, see MALCOLM, *supra* note 8. For a quite different reading of the English experience, see Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 LAW & HIST. REV. 567, 571-73 (1998); Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 30-31 (2000).

87. *See* RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, 3-4 (1975).

American minds as a foreign, anti-libertarian institution.”<sup>88</sup> Remote and local experience came together in the Revolutionary War. Among the colonists’ principal complaints against George III was his use of the military against the civilian population. In the words of the Declaration of Independence, “He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power.”<sup>89</sup>

Many colonists believed that severing the tie to England was not by itself sufficient to avert such harms. Even as the Revolutionary War was being fought, they included in the Articles of Confederation provisions designed to ensure that domestic government would not become tyrannical in the way that George III’s rule had. Article VI prohibited states from maintaining a peacetime navy or a peacetime standing army without Congressional authorization and obligated the states to equip and train a militia. Article IX authorized Congress to maintain a national navy and to requisition state forces for a national army, but required a supermajority for waging war. The Articles thus employed civilian control of the military and the continued existence of state militias as the means to avert tyranny.

The original Constitution further concentrated military power in the federal government. Federalists who had seen the Continental army outperform the militia during the Revolution—including, especially, George Washington—favored a strong national military force,<sup>90</sup> while most Antifederalists grudgingly accepted the need for some national military institutions.<sup>91</sup> In the Constitution that emerged, civilian control of the military was assured through both the executive and legislative branches. The president was designated Commander in Chief of federal forces and of the state militias when called into service, while Congress was granted authority over funding, maintenance, training, and use of federal land and naval forces, as well as state militias. No provision of the original Constitution exactly paralleled the Articles’ requirement that states maintain their militias, although one can probably be inferred from

88. *Id.* at 4.

89. THE DECLARATION OF INDEPENDENCE, *in* CONTEXTS OF THE CONSTITUTION 37, 38 (Neil H. Cogan ed., 1999).

90. See KOHN, *supra* note 87, at 9-10; GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 31-36 (1999).

91. See MALCOLM, *supra* note 8, at 151. For the development of the schism between Federalist and Antifederalist (later Republican) views about the military, see KOHN, *supra* note 87, at 86-87.

the assumption that militias would exist to be called upon by the federal government and from the reservation to the states of the power of "[a]ppointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."<sup>92</sup>

The story of the ratification debate is a familiar one. Antifederalists objected to the strength of the federal government. To the extent that opponents of ratification worried about arms, their principal concern was that the federal government would establish a standing army.<sup>93</sup> Ratification was obtained through a bargain. "[I]n order to gain acceptance of their handiwork, the Federalists had to commit themselves, unofficially, to the formulation of a bill of rights when the first Congress met in 1789."<sup>94</sup> The ultimately enacted Bill of Rights contained what is now the Second Amendment.

And therein lies the puzzle, for the Second Amendment does nothing to prevent the maintenance of a federal standing army, nor does it remotely insulate state militias from federal control.<sup>95</sup> Congress retains the authority to prescribe training for state militias and to call them into federal service, while the president commands them when thus called. Why, then, did Antifederalists and others who disdained standing armies settle for the Second Amendment?

My admittedly amateur reading in the area leads me to conclude that even professional historians specializing in the period do not have a definitive answer to this question, although there are a number of possibilities. One possibility, of course, is that the founders were principally interested in protecting an individual right to rebellion and self-defense, but there are at least two other, in my view more plausible, explanations of the apparent mismatch between the Second Amendment and the goals of those who feared federal power. First, some, perhaps most, of the framers and ratifiers of the Second Amendment may have believed that it would serve to negate the inference from the 1787 text that standing federal forces were anything more than a necessary evil. As Madison argued, removing federal control of the militia would have left the federal government

92. U.S. CONST. art. I, § 8.

93. See MALCOLM, *supra* note 8, at 155-56 (describing ratification debates in Massachusetts, Virginia, and Pennsylvania).

94. MICHAEL KAMMEN, *THE ORIGINS OF THE AMERICAN CONSTITUTION* at vii, xix (Michael Kammen ed., 1986); see also Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1187 nn.47-50 (1996) and sources cited therein.

95. The point was not lost on astute Antifederalists. See MALCOLM, *supra* note 8, at 163 (citing *Centinel, Revived*, no. 24, INDEP. GAZETTEER (Sept. 9, 1789)).

more, rather than less, dependent on a standing army.<sup>96</sup> In an era before judicial review was firmly established as the principal means of enforcing constitutional safeguards, the Second Amendment would have been understood as a reminder to Congress to prefer defense by militia to defense by standing army.<sup>97</sup>

A second possibility is that the Second Amendment was intended to protect the *states'* right of organized resistance against federal tyranny. Once again, Madison is instructive. In *The Federalist No. 46*, he explains why, given the representation of the states in the federal government, resort to such resistance would not be necessary. But, he goes on, “[e]xtravagant as the supposition is” that the federal government would accumulate a standing military force for the purpose of destroying the states,

let it, however, be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by Governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.<sup>98</sup>

Some scholars point to *The Federalist No. 46*—especially Madison’s statement, immediately following the text quoted above, that “over the people of almost every other nation,” Americans possess “the advantage of being armed”<sup>99</sup>—in support of the individual right interpretation of the Second Amendment.<sup>100</sup> Yet the armed

96. *See id.* at 156.

97. *See id.* at 164.

98. THE FEDERALIST NO. 46 (James Madison). *Accord* THE FEDERALIST NO. 29 (Alexander Hamilton) (“[I]f circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.”).

99. THE FEDERALIST NO. 46 (James Madison).

100. *See, e.g.,* David Harmer, *Securing a Free State: Why the Second Amendment Matters* 1998 BYU L. REV. 55, 83-84; Van Alstyne, *supra* note 50, at 1245.

resistance Madison contemplates in *The Federalist No. 46* quite clearly occurs under the official aegis of the states—not by self-styled patriots. The founding generation's conception of armed resistance, indeed the whole concern over standing armies, is probably best understood in federalism terms, as part of a struggle between the states and the federal government rather than between individuals and (either state or federal) government.

What of Madison's assumption that the people would have arms? The short answer is that the assumption was inaccurate. Historian Michael Bellesiles has discovered that fewer than seven percent of white males in western New England and Pennsylvania owned working guns upon their deaths.<sup>101</sup> As Garry Wills effectively argues, Bellesiles's discovery is consistent with other evidence tending to show that the notion of founding-era militias comprising nearly all able-bodied adult white males was never more than a myth.<sup>102</sup> The romantic attachment to the militia arose, Wills contends, because of their role in keeping order on the home front—protecting against, among other things, Indian attacks and slave revolts<sup>103</sup>—while the Continental army won the war against the British.

Why does it matter that the founders' assumptions about an armed populace were in error? In part it matters because of the reasons we have for caring about the founders' views. Within the *ancestral* category, if we discover that their understanding of the facts was false, "we may discount their views."<sup>104</sup> The same logic applies within the *heroic* category, when "the framers'" values are simply too distasteful to count as support for a given proposition.<sup>105</sup> It is in this spirit, I believe, that Carl Bogus offers his discovery that many of the supporters of the Second Amendment feared that the federal government would disarm the militia, and thus disempower the principal mechanism for suppressing slave revolts. Hence he concludes his study: "The Second Amendment takes on an entirely different complexion when instead of being symbolized by a musket in the hands of the minuteman, it is associated with a musket in the

101. See WILLS, *supra* note 90, at 29 (citing Michael A. Bellesiles, *The Origins of the Gun Culture in the United States, 1760–1865*, J. AM. HIST., Sept. 1996, at 429).

102. See WILLS, *supra* note 90, at 28–38.

103. See *id.* at 36–37. On the relation between fears of slave revolts and the Second Amendment, see Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998) [hereinafter *Hidden History*]; Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993).

104. Dorf, *supra* note 7, at 1809.

105. *Id.* at 1810.

hands of the slave holder.”<sup>106</sup> If, as I have argued elsewhere, ancestral and heroic originalism better capture the relevance of original understanding to constitutional interpretation than does the social contract theory of strict originalism, the historical work of scholars like Bellesiles and Bogus substantially undermines the individual right position.<sup>107</sup>

Of course, advocates of the individual right position may fare better with respect to the first reason I identified above for caring about original meaning—to understand, in historical context, what the people who adopted the Second Amendment had in mind. If, in 1791, the language of the Second Amendment was widely understood to protect an individual right to firearms possession, then that fact must count somewhat in favor of such a contemporary reading—even if other factors, including other historical factors (understood through the lens of ancestral and heroic originalism), ultimately lead us to reject it. Thus we come to the question: How were the words of the Second Amendment understood at the time of its adoption?

Begin with the question of who are the militia of the Second Amendment’s preamble. Akhil Amar gives a concise statement of the individual right perspective: “Nowadays,” he writes,

it is quite common to speak loosely of the National Guard as “the state militia,” but two hundred years ago, any band of paid, semiprofessional, part-time volunteers, like today’s Guard, would have been called “a *select corps*” or “*select militia*”—and viewed in many quarters as little better than a standing army.<sup>108</sup>

Here Amar appears to make the same mistake that Madison makes in *The Federalist No. 46*; he assumes a false universality of militia service. Nonetheless, it could be argued this false assumption reflected founding-era ideology, and it is that ideology—rather than the facts as they were—that underlies the Second Amendment. On this reading, the “militia” of the Second Amendment’s preamble is synonymous with the “people” of its operative clause, which in turn refers to the people in their individual capacities.

Putting aside the anomaly this reading creates given the

106. Bogus, *Hidden History*, *supra* note 103, at 408.

107. Like all normative uses of history, this claim can be challenged on normative grounds. For example, although Bellesiles, Wills, and I believe that the scarcity of guns during the founding ultimately undermines the individual right interpretation of the Second Amendment, Volokh argues that it supports that interpretation, because it rebuts a changed-circumstances claim. See Volokh, *supra* note 4, at 838 (responding to Williams, *supra* note 63, at 554). Despite self-styled originalists’ frequent claims to the contrary, appeals to the past are no less contestable or contested than other kinds of constitutional argument.

108. AMAR, *supra* note 65, at 51.



longstanding congressional and judicial understanding of “militia,”<sup>109</sup> this is a plausible account of how many eighteenth-century readers would have approached the language, although certainly there would have been many readers—including such significant figures as George Washington—who would not have shared the ideological gloss, and thus would have distinguished the militia from the people. Still, even if we score the debate over the original understanding of “militia” as a bare victory for the individual right scholars, we are left with the question of what “bear arms” meant.

Overwhelmingly, the term had a military connotation.<sup>110</sup> Although there is no true substitute for the professional historian’s thorough immersion in the original sources of the day, computer databases can assist the amateur historian in getting a feel for how terms were used. Searching for the phrase “bear arms” in the Library of Congress’s database of congressional and other documents from the founding era produces a great many references, nearly all of them in a military context.<sup>111</sup> To be sure, one can find the occasional disparate usage, especially among Pennsylvanians. For example, the Pennsylvania Constitution of 1776 provided, in part: “The people have a right to bear arms for the defense of themselves and the State.”<sup>112</sup> Some Pennsylvania Antifederalists went even further, proposing an amendment that would have stated, in part, “That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game.”<sup>113</sup> But while these uses show that the phrase “bear arms” could be, and sometimes was, adapted to include activities outside of

109. See *supra* text accompanying notes 67-73.

110. See Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62, 66. In my view, Wills somewhat overstates his case, see Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENTARY 269, 274-81 (1999), but on this point he is basically correct.

111. The interested reader should point his or her browser to <<http://memory.loc.gov/ammem/collections/findex.html>>, click on “Political Science and Law,” and choose a database.

112. PENN. CONST. OF 1776, in 8 WILLIAM FINLEY SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 279 (1979).

113. *Amendments Proposed by Pennsylvania Convention Minority* (Dec. 12, 1787), in EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 173, 174 (1957). This band of Pennsylvanians also proposed an additional amendment that would have guaranteed against federal interference private landowners’ “liberty to fowl and hunt” on their own land while protecting that right for everyone on unenclosed public land. See *id.* In yet another provision, they would have stripped Congress of the “authority to call or march any of the militia out of their own State, without the consent of such State, [or beyond] such length of time . . . as such State shall agree.” *Id.* Thus the political views of the proponents of the “killing game” provision were at one end of the spectrum, and it is a fair inference that they used the phrase “bear arms” idiosyncratically in pursuit of their strongly Antifederalist political ends.

the organized military,<sup>114</sup> they hardly cast doubt on the dominant usage.

Despite these reasons to be cautious, there are, in my view, three nonfrivolous (but ultimately unpersuasive) reasons why one might conclude that when it was adopted the Second Amendment conferred an individual right to own firearms. First, as Volokh notes, a right to bear arms appeared in state constitutions of the founding era, where it would have had nothing to do with federalism.<sup>115</sup> He therefore infers that at the founding a right to bear arms—whether it appeared in a state or the federal constitution—was understood as a right of the individual *against* the government.

There is some plausibility to this argument, I admit, but it may anachronistically interpret rights. Although Republican Revivalists have no doubt sometimes overstated their case, they are surely correct that the modern liberal conception of rights as trumps or shields against the state was not universally accepted at the founding.<sup>116</sup> In a period of intellectual upheaval over the meaning of most public institutions, there would have been nothing especially anomalous about a state constitution using the language of rights to protect a liberty of the ancients.<sup>117</sup> Moreover, even if Volokh's reading of the state constitutions of the day is correct, the phrase "bear arms" might well have meant something quite different in the federal Constitution, where, as all acknowledge, it was inspired by fears about the relative strength of the state and federal governments. Most importantly, as Saul Cornell cautions, it is easy to (mis)read the founding through the prism of modern understandings of rights. The Pennsylvania Constitution of 1776 coexisted with a loyalty oath requirement that made quite clear that the right to arms, even for self-defense, was reserved for those deemed trustworthy by the state.<sup>118</sup> Similar restrictions in other colonies and states<sup>119</sup> indicate that

114. See Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, LAW & CONTEMP. PROBS., Winter 1986, at 151, 153.

115. See Volokh, *supra* note 5, at 810-12.

116. For a fair rendition of the brief against the Republican Revival from one of its sympathizers, see Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025, 1025-38 (1998) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)).

117. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 85 (1999) (At the founding, "[b]earers of rights included legislatures, governments, cities, colonies, countries, specific communities, and 'the people' as a collective entity distinct from individuals."); *id.* at 87 ("many Founding rights were genuinely collective").

118. See Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221, 228-31 (1999).

even some of the seemingly more expansive protections for arms-bearing in founding era state constitutions were probably understood to confer something less than an individual right against the state.

The second plausible historical basis for the individual right interpretation of the Second Amendment is that many people in the late eighteenth century believed they had such a right. It is undoubtedly an oversimplification to believe that there was a single, well-understood "philosophy" that entitled all adult white male citizens to possess arms.<sup>120</sup> Still, one can find evidence that such a view was widely held. Blackstone wrote of the people's limited right "of having arms for their defense"<sup>121</sup> and his views were quite influential in the colonies. But such a right may well have been understood as a natural right,<sup>122</sup> quite distinct from the positive rights set out in the Constitution. Although there were certainly some people among the founding generation who believed that the Constitution protected all natural rights,<sup>123</sup> the distinction between natural and positive law was generally understood, if controversial, at the founding.<sup>124</sup> Thus, even if some of the founders equated their

119. See Bellesiles, *supra* note 86, at 574-76; Shalhope, *supra* note 110, at 273.

120. But see MALCOLM, *supra* note 8, at ix (asserting the existence of such a "philosophy behind the right").

121. 1 WILLIAM BLACKSTONE, COMMENTARIES \*139. The full quotation is:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute, 1 W & M st. 2.c.2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and law are found insufficient to restrain the violence of oppression.

*Id.*

122. See, e.g., JAMES WILSON, *Of the Natural Rights of Individuals*, in 2 THE WORKS OF JAMES WILSON 307, 335 (J.D. Andrews ed. 1896) ("The defence of one's self, justly called the primary law of nature, is not, nor can it be abrogated by any regulation of municipal law."), quoted in Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 11 (1988). As Steven Heyman shows, however, many of the founders who believed in natural rights would not have thought that a right of armed defense existed outside the state of nature. See Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237 (2000).

123. But see PRIMUS, *supra* note 117, at 88 ("Few Founders rested their rights on nature alone, and some found natural rights claims dubious.").

124. Compare *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-88 (1798) (Chase, J.) ("I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State."), with *id.* at 399 (Iredell, J., nominally dissenting although actually concurring in the judgment) ("The ideas of natural justice are regulated by no fixed standard."). Federalists who doubted the wisdom of a Bill of Rights questioned whether even specifically enumerated rights could effectively check government power. See THE FEDERALIST NO. 84 (Alexander Hamilton) ("What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?").

natural law views about arms ownership with the Second Amendment's meaning,<sup>125</sup> it does not follow that they enacted their assumption into law—either as a matter of eighteenth or twenty-first-century logic.<sup>126</sup>

This leads me to the third and final plausible (but again ultimately unpersuasive) historical basis for the individual right interpretation—the text itself. The Second Amendment protects a right not only to “bear” but also to “keep” arms. It is possible that some people understood “keep” to broaden the military connotation that “bear” would otherwise assume. A militiaman would “bear” arms only while on active duty, but when not called to muster he would “keep,” that is maintain private possession of, his weapon—therefore having it available to deter tyranny, for self-defense, and even for killing game.

The principal difficulty with this last argument is that “keep and bear” appears to have been understood as a unitary phrase, like “cruel and unusual” or “necessary and proper.” I have not come across any documents of the period that parse the phrasing as finely as I have suggested.<sup>127</sup> However, I must acknowledge that if the distinction between unspoken assumptions and enacted text can be invoked against a proposed interpretation, it can also be invoked in favor of that interpretation, and so it is possible that the plain meaning of “keep” would have been sufficient to connote an individual right. But then, ironically, our detour through eighteenth-century history will have left us more or less where we began: puzzling over the naked text.

While we are revisiting the text, we may wish to pay attention, finally, to “arms.” Even if we assume that the individual right interpretation of the Second Amendment best reflects the original understanding, we still must face the question of what “arms” it protects today. As Wills notes, at the founding, very few Americans

125. See Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787–1823*, 7 WM. & MARY BILL RTS. J. 347 (1999). But see Heyman, *supra* note 122, at 237 (arguing that at the founding armed self-defense was not understood as a natural right within civil society).

126. These days to accuse someone of believing that the Constitution embodies the framers' views about natural law is to hurl an epithet. See *Alden v. Maine*, 119 U.S. 2240, 2270 (1999) (Souter, J., dissenting).

127. Because the collective “right” of defense by militia may have been originally understood to impose an individual duty of militia membership, see *infra* text accompanying note 152, we might conclude that in an era of scarce weaponry the inclusion of “keep” would have been understood as a command to militia members to have weapons ready where they were not supplied by the state.

possessed pistols or rifles, which were not, in any event, considered effective military weapons.<sup>128</sup> Therefore, when the ratifiers of the Second Amendment saw the word “arms,” they would have likely thought of muskets.

An originalist of the narrowest sort might therefore conclude that even today “arms” means muskets no more advanced than those commonly available in 1791. Even if we properly reject that narrow approach, we are left with the quite subjective task of applying the founders’ understanding of arms to a world they could not have anticipated.<sup>129</sup> There is no obviously correct “translation.”<sup>130</sup> Chemical and biological weapons seem clearly out, but why? Is it because of the enormous harm they can cause? That reasoning could also support a ban on nearly all modern firearms—which are much more accurate and powerful than the Revolutionary-era musket.<sup>131</sup>

These sorts of difficulties are not, of course, unique to the Second Amendment. Technologically advanced forms of surveillance call for similar judgments under the Fourth Amendment, for example.<sup>132</sup> And when the Supreme Court decided that radio and television are easier to regulate than newspapers,<sup>133</sup> it was, in some sense, applying the founders’ understanding of the First Amendment’s protection for “freedom . . . of the press” to (its arguably misguided understanding of) the electromagnetic spectrum. But the judgments that these sorts of cases require are not, primarily, historical ones; they are normative.

128. See WILLS, *supra*, note 90, at 29-31.

129. See *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (“[I]t is the task of the judge in this generation to discern how the framers’ values, defined in the context of the world they knew, apply to the world we know.”).

130. See Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 402-03 (1997) (arguing that there is no clear answer to the question of how much of the founders’ world view to translate and how much to treat as constant).

131. One could distinguish chemical and biological weapons, on the one hand, from long guns and handguns, on the other, on the ground that the harm caused by the former is largely indiscriminate. That is probably a sound distinction, but it is a normative distinction, not a linguistic or historical one.

132. Compare *Katz v. United States*, 389 U.S. 347 (1967) (holding electronic eavesdropping subject to Fourth Amendment requirements), with *id.* at 364-66 (Black, J., dissenting) (arguing that the Fourth Amendment does not apply because eavesdropping was not considered a “search” at the founding).

133. Compare *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding a right of reply to television attacks and television editorials), and *National Broad. Co. v. United States*, 319 U.S. 190, 216 (1943) (upholding FCC’s authority to select licensees based on “service to the community”), with *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a Florida statute granting political candidates a right of reply to newspaper attacks).

#### IV. POSTADOPTION HISTORY

The difficulties we encounter in applying the Second Amendment to modern circumstances should focus our attention on how the world has changed since the founding. There are numerous salient differences between the modern world and the one the framers inhabited. The American frontier is closed; many of us live in large, densely populated cities or suburbs; our population is much more heterogeneous than it was; in both absolute and per capita terms we have substantially more firearms than at the founding, and those we have are much more potent; the United States has become the leading military power in the world; and the United States Supreme Court has emerged as an institution committed to preserving basic liberty and thus preventing tyranny. These and other developments indicate that even if we had located a completely clear consensus concerning the meaning of the Second Amendment at the founding, and even were we committed to a static view of constitutional meaning, we would face a difficult interpretive task in applying the founding-era understanding to modern circumstances. For those (like myself) who are not committed to a static view, the difficulties multiply.

A full treatment of the subject would inquire how the prevailing understandings of the Second Amendment changed over time, beginning at the founding and taking us right to the present moment, through a process that Barry Friedman and Scott Smith have aptly termed “sedimentary.”<sup>134</sup> My somewhat condensed account may appear to leave out many developments, especially those of the very recent past, but we do well to recall “that because all of our accumulated history is immanent in us, our constitutional commitments may be found in more recent, rather than more ancient, history.”<sup>135</sup> The impact of recent history will be felt more directly below when I turn to normative considerations.

This Part focuses on two nineteenth-century events: the Civil War and the emergence of organized police forces. It sketches some implications of these events, which implicate, respectively, the

134. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5-6 (1998) (“[H]istory is essential to interpretation of the Constitution, but the relevant history is not just that of the Founding, it is that of all American constitutional history.”); see also Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1636 (1997) (“[D]oesn’t a conception that recognizes continuing evolution make sense, especially in light of our actual experience with governing?”).

135. Friedman & Smith, *supra* note 134, at 8.

insurrectionist and the self-defense accounts of an individual right to own firearms. This Part then considers Amar's argument that, notwithstanding these changes, a nineteenth-century transformation of the Second Amendment from an insurrectionist to a self-defense model justifies interpreting it and the Fourteenth Amendment as protecting an individual right of firearms ownership. Although there is much I admire in Amar's approach, I find it ultimately unpersuasive.

### A. *The Civil War*

Perhaps at the founding it was plausible to interpret the Second Amendment as reserving to the states a right of rebellion should the federal government become tyrannical. In my view, even then it was not plausible (in the sense of workable) to assign this right of rebellion to individuals, as was demonstrated by the role of the militia in putting down Shays's Rebellion<sup>136</sup> on the eve of the Constitutional Convention and (after considerable delay) the Whiskey Rebellion<sup>137</sup> just three years after the adoption of the Second Amendment. On both occasions, self-styled patriots objected to what they saw as acts of tyranny—in the former instance, by the government of Massachusetts; in the latter, by the federal government. Yet when the rebels took up arms, they were put down by the militia because, in the unsurprising judgment of the properly constituted governments, no tyrannical conditions justified the revolt. These events demonstrated in the founding era what acts by the likes of Timothy McVeigh have demonstrated in our own time: that placing a right to rebel against tyranny in the hands of individuals risks violence by every would-be Spartacus.

Does a right of rebellion lodged in the hands of the states stand on a firmer footing than an individual right to rebel? Unlike self-promoting demagogues and other rash individuals or private groups, we might imagine that the states in their official capacities would be motivated to act only in a true crisis of the sort Madison describes in *The Federalist No. 46*. However, even in the eighteenth century, this was a dubious strategy, as was illustrated by the failed attempt by Madison and Jefferson to rouse the state legislatures in defiance of

136. Although the Massachusetts militia eventually put down Shays's Rebellion, the event was an important factor in convincing Federalists of the inadequacy of militias even to protect against domestic threats. See KOHN, *supra* note 87, at 74-75.

137. See *id.* at 157-70.

the Sedition Act through the Virginia and Kentucky Resolutions. As a result of that failure, those who feared excess federal power chose a new strategy that has been effective ever since—they shifted the locus of opposition to federal policy from the states to a newly organized opposition political party.<sup>138</sup>

Notwithstanding this shift, prior to the Civil War, perhaps it still might have been thought that state-organized armed resistance remained available as the ultimate check on federal power. That bloody conflagration taught otherwise. In some sense, of course, as Amar argues, the taking up of arms by the Confederacy was an “abuse” of the right of resistance because “none of the constitutional prerequisites for this ultimate form of self-help had been met.”<sup>139</sup> But this observation merely highlights the impracticality of a collective right of rebellion. We reject an *individual* right of insurrection limited to those occasions that truly justify insurrection because we rightly fear that too many individuals will try to use the right when it is not justified.<sup>140</sup> So too we may rightly reject a *state* right of insurrection limited to those occasions that truly justify insurrection because we rightly fear that states will try to use the right when it is not justified.<sup>141</sup>

Nonetheless, even if, convinced by the lessons of our history,<sup>142</sup> one concludes that there is no constitutionally protected right of rebellion, it would still be possible to defend an armed populace on the ground that it poses the *threat* of rebellion or resistance that keeps the government in line. Just as nuclear arms are more useful as a deterrent than in war, so, it could be argued, an individual (or, for that matter, a state) right to bear arms acts as a sword of Damocles.

Yet if we accept this logic—which is dubious even in the case of nuclear weapons<sup>143</sup>—we undermine one of the main protections

138. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1519 (1994).

139. Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 501 (1991); accord Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1499-1500 (1987) (arguing that the Confederacy’s claimed right of secession was not and could not have been justified under the Federalists’ theory of a right to revolt against a national coup).

140. Timothy McVeigh’s invocation of Jefferson upon his arrest is a chilling case in point. He wore emblazoned on his shirt Jefferson’s statement that “[t]he tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.” Jo Thomas, *Trial Begins in the Oklahoma City Bombing Case*, N.Y. TIMES, Apr. 25, 1997, at A1.

141. McVeigh completes the circle in grisly fashion. The shirt that bore Jefferson’s words on the back, paid homage to John Wilkes Booth on the front, carrying his image, as well as Lincoln’s, along with Booth’s “Sic Semper Tyrannis.” *Id.*

142. See Dorf, *supra* note 7, at 1815 (discussing the lessons the Civil War taught).

143. See Jonathan Schell, *The Unfinished Twentieth Century: What We Have Forgotten About Nuclear Weapons*, HARPER’S, Jan. 2000, at 41.



against tyranny in the modern age: the right of free speech. Modern free speech doctrine—which is much more permissive than the original understanding of free speech<sup>144</sup>—draws a critical distinction between speech and action.<sup>145</sup> However difficult the task of distinguishing “advocacy of abstract doctrine and advocacy directed at promoting unlawful action,”<sup>146</sup> and even if expressive conduct is “100% action and 100% expression,”<sup>147</sup> there is no plausible argument that stockpiling weapons is protected expression. Yet, if the right to own but not use weapons is protected as a means of deterring tyranny, must the government wait to act until the weapons are actually used? It is difficult to see how the government could intervene to prevent serious harm at an earlier point *except* by distinguishing among the political aims of weapons-owners. It would be a bizarre doctrine indeed that permitted one either to teach the (abstract) necessity of overthrowing the government *or* to stockpile weapons, but not to engage in both otherwise protected activities.

The point is not simply that as the putative right of insurrection has come to be seen as less useful, the right of free speech has taken over some of the work of preserving liberty.<sup>148</sup> The point is that a right of private possession of firearms may actually impede the right of free speech in doing that work.

### B. Police

“In the eighteenth century the primary responsibility of the militia was not public defense but internal security.”<sup>149</sup> Professional police forces as we know them today were first created in the nineteenth century.<sup>150</sup> Prior to the emergence of the police, ordinary

144. According to the received view, the First Amendment has long been understood, at a minimum, to prohibit prior restraints. See *Near v. Minnesota*, 283 U.S. 697, 713-19 (1931). More expansive protections did not take firm route in constitutional jurisprudence until the 1960s. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 449-50 (1969) (Black, J., concurring) (celebrating the demise of the “clear and present danger” test).

145. See *Yates v. United States*, 354 U.S. 298 (1957).

146. *Id.* at 318. Although nominally an interpretation of the Smith Act, *Yates* has come to be understood as a constitutional decision. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 847 (2d ed. 1988).

147. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495-96 (1975).

148. Cf. AMAR, *supra* note 65, at 49-50 (discussing the need for such “arms” as modems, the internet, and fax machines).

149. Bellesiles, *supra* note 86, at 581.

150. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 67-68 (1993) (“One of the major social inventions of the first half of the nineteenth century was the creation of police forces: full-time, night-and-day agencies whose job was to prevent crime, to

citizens would bring what arms they had in response to a “hue and cry” or when serving on a *posse comitatus*.<sup>151</sup>

It is not immediately clear whether the nonexistence of professional police at the founding strengthens or weakens the individual right thesis. On a narrowly originalist reading, this fact serves to highlight that arms possession by members of the militia was not a strictly military function in the sense of responding to external threats; it included protecting one’s self and one’s neighbors from all manner of threats. If ordinary (white male) civilians performed functions at the founding like those subsequently assumed by the police, then, on narrowly originalist premises, it follows that they may perform such functions today, and this would include possessing firearms.

On the other hand, the nonexistence of professional police at the founding may have an impact on what purpose the right to keep and bear arms served then, and thus, on a less narrowly originalist approach to interpretation, should tell us something about how to fulfill that purpose today. To the extent that the Second Amendment “right” to bear arms was in substantial measure a duty of the responsible citizenry to participate in the collective self-defense of the community,<sup>152</sup> i.e., to the extent that it was understood as a liberty of the ancients, the government may be understood to respect that right today by maintaining professional police.<sup>153</sup>

If we take this latter approach,<sup>154</sup> further questions arise. If the state fails to provide adequate police protection against private violence, do individuals then have a right to resort to armed self-help?<sup>155</sup> Or, more radically, does the Second Amendment imply a

keep the peace, and to capture criminals.”).

151. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 832 (1994) (citing FRIEDMAN, *supra* note 150, at 29, 68, 174, and Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. 3, 19 (3d ser. 1970)).

152. See Bellesiles, *supra* note 86, at 573-74 (“Possession of firearms [in colonial times] was not understood as a collective right but rather as a collective duty necessary to the defense of society, with that collectivity precisely defined and far from inclusive.”).

153. As Williams argues at length, however, a professional police force would not fulfill the public participation function of the militia. See Williams, *supra* note 63, at 572-81. Whether the militia ever served such a function, and whether, if so, modern forms of community policing or other forms of local participation serve them as adequately, are questions I do not address.

154. See Levinson, *supra* note 3, at 656 (“[O]ne can argue that the rise of a professional police force to enforce the law has made irrelevant, and perhaps even counterproductive, the continuation of a strong notion of self-help as the remedy for crime.”).

155. For a suggestion that such a right can be inferred regardless of whether the state provides police protection because, under *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), the state has no constitutional obligation to provide police protection, see David E. Murley,

right to adequate policing, enforceable by the judiciary if not by self-help? There are nonfrivolous moral arguments for such entitlements, whether or not they are rooted in the Second Amendment.

One difficulty with describing the Second Amendment as an antiquated police provision is the fact that the nation hardly outgrew the idea of privately owned arms for self-defense as soon as professional police came on the scene. Throughout the nineteenth century, much of America remained a frontier society, and armed self-help was widespread even in urban centers: in the middle of the nineteenth century, a prominent New York City businessman reported that, due to fears of mob violence, "most of his friends never left home without a pistol."<sup>156</sup>

The use of privately owned firearms for self-defense seemed to increase, rather than decrease, even as police forces came on the scene, and for many the language of arms-bearing came to be associated with self-defense. This is hardly to say that the Second Amendment was completely transformed into a private right during the nineteenth century. The connection between arms-bearing and the safeguarding of democracy persisted.<sup>157</sup> But even if one can quibble over the details of the tale he tells, Amar is generally correct in claiming that, between the founding and Reconstruction, the right to bear arms came to be understood less in terms of states' collective interests against the government and more in terms of individuals' rights against state interference with their efforts to protect themselves against private violence.<sup>158</sup>

How much modern interpretive weight should be given to the fact that the ideology of gun ownership for self-defense seems to have grown, rather than diminished, during the nineteenth century? The most straightforward answer is: not much. We began the present inquiry by noting that at the founding the militia served a function

*Private Enforcement of the Social Contract: DeShaney and the Second Amendment Right to Own Firearms*, 36 DUQ. L. REV. 827, 851-53 (1998).

156. Andrew Delbanco, *Sunday in the Park with Fred*, N.Y. REV. BOOKS, Jan. 20, 2000, at 55 (reviewing WITOLD RYBCZYNSKI, *A CLEARING IN THE DISTANCE: FREDERICK LAW OLNSTEAD AND AMERICA IN THE NINETEENTH CENTURY* (1999)) (citing diary of George Templeton Strong).

157. See 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 646 (1833) ("The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.").

158. See AMAR, *supra* note 65, at 259 ("It was now less a right of the people, and more an individualistic privilege of persons.").

now generally served by the professional police. At some point between the founding and the present, many people thought that private arms for self-help against private violence had taken over (at least part of) the function of the militia. Eventually, with the closing of the frontier and the increasing professionalization of police forces, fewer people came to hold that view. If we want to know how the founders' conception of the militia and arms-bearing applies in the modern world, it is not at all clear that we should focus much attention on the world as it was during the intermediate period of the nineteenth century. The most salient question would seem to be: given conditions as they are *now*, how do we best understand the founders' text?

### C. *Incorporation, Reverse Incorporation, and Time Travel*

Before concluding that nineteenth-century attitudes towards arms-bearing have little direct relevance to the twenty-first-century meaning of the Second Amendment, we must confront an argument that would give critical importance to the nineteenth-century—or to be more precise, the 1868—understanding of the right to bear arms. Amar contends that when the Fourteenth Amendment was ratified in 1868, a right to bear arms was understood by Reconstruction Republicans and others as a right of armed self-defense against private violence. The struggle against slavery had, to use the vocabulary of the nineteenth century, moved arms-bearing from the class of *political* rights like voting, that only belonged to full members of the political community, into the class of personal or civil rights like personal security, possessed by all citizens—including white women and, following the Thirteenth and Fourteenth Amendments, blacks.<sup>159</sup> In Amar's view, if a provision of the Bill of Rights "is a personal privilege—that is, a private right—of individual citizens, rather than a right of states or the public at large," the Privileges or Immunities Clause of the Fourteenth Amendment prohibits states from infringing it.<sup>160</sup> Thus, he apparently concludes, the Fourteenth Amendment protects a private right of arms for self-defense against state interference.<sup>161</sup>

159. See *id.* at 258-66; see also Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 333-49 (1991) (describing the legal restrictions on, and the value of a right to, firearms ownership by blacks during the nineteenth century).

160. AMAR, *supra* note 65, at 221.

161. I say "apparently" because Amar would allow many forms of firearm regulation that

One consequence that seems to follow from this theory is “that *federal* gun control legislation would be essentially invulnerable under the Second Amendment provided the state militia were not undermined, while *state and local* gun control legislation would have to satisfy some heightened form of scrutiny.”<sup>162</sup> Yet that is a strikingly odd result, given that the only express reference to arms-bearing appears in the provision that limits the federal government.

The oddity could be avoided if one imagined that the enactment of the Fourteenth Amendment simultaneously changed the meaning of the Second, by a “feedback effect”<sup>163</sup> that Laurence Tribe labels “time travel.”<sup>164</sup> Although one might be appropriately skeptical of any interpretive method called time travel,<sup>165</sup> the phenomenon is in fact quite familiar. Aside from constitutional amendments that expressly repeal or modify earlier-enacted provisions, the most famous example of constitutional time travel is, of course, *Bolling v. Sharpe*,<sup>166</sup> in which the Supreme Court held that the Fifth Amendment Due Process Clause—ratified by slaveholders in 1791—prohibited de jure racial segregation in District of Columbia public schools.

Yet the theory of *Bolling* most certainly was not that the framers and ratifiers of the Fourteenth Amendment intended to prohibit de jure segregation. To the contrary, *Brown v. Board of Education*,<sup>167</sup> to which *Bolling* was a companion, found the evidence of the original meaning of the Fourteenth Amendment “inconclusive.”<sup>168</sup> *Bolling* itself was even more self-consciously presentist, justifying its conclusion on the ground that any other result would be “unthinkable.”<sup>169</sup> Clever lawyers can concoct all sorts of arguments for why *Bolling* is no more problematic than *Brown*,<sup>170</sup> but for an

most proponents of the individual right view would not, and because Amar acknowledges that alternative readings of the Second Amendment may be better suited to our times. See Akhil Reed Amar, *Second Thoughts: What the Right to Bear Arms Really Means*, NEW REPUBLIC, July 12, 1999, at 24, 26-27.

162. TRIBE, *supra* note 1, at 902 n.221; see also Powe, *supra* note 8, at 1375.

163. AMAR, *supra* note 65, at 243 (discussing the First Amendment).

164. TRIBE, *supra* note 1, at 902 n.221.

165. Tribe himself does not use the term mockingly. See *id.* at 67.

166. 347 U.S. 497 (1954).

167. 347 U.S. 483 (1954).

168. *Id.* at 489, 492 (“[W]e cannot turn the clock back to 1868.”).

169. *Bolling*, 347 U.S. at 500.

170. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 766-73 (1999) (suggesting justifications for *Bolling* based on the Citizenship Clause of the Fourteenth Amendment, the federal Title of Nobility Clause, the federal Bill of Attainder Clause, and finally, the Fifth Amendment Due Process Clause); Laurence H. Tribe, *Taking Text and*

originalist, that still leaves the puzzle of *Brown* itself. And despite some determined revisionism, the overwhelming weight of historical evidence indicates that *Brown* is contrary to the original understanding.<sup>171</sup>

Thus, upon inspection, *Bolling* undermines, rather than supports, a reconstructed individual right to own firearms based on the Amar/Tribe approach, because *Bolling* decidedly rejects the idea that the enactment of the Fourteenth Amendment updated the meaning of the Fifth Amendment from 1791 to 1868 and froze it there. Instead, *Bolling* reflects the common-sense idea that experience over time can prompt a reexamination of the meaning of prior commitments, at least where those commitments are embodied in capacious text. In short, on any plausible reading, *Bolling* and *Brown* stand for the proposition that the meaning of a constitutional provision need not be fixed by the concrete intentions, expectations, or understandings of its adopters.<sup>172</sup>

Nor do Amar and Tribe subscribe to narrow originalism. Tribe may have backed away somewhat from the view of the Second Amendment that he and I set forth nearly a decade ago—that it is “most plausibly . . . read to preserve a power of the state militias against abolition by the federal government,”<sup>173</sup>—but I do not read any of his recent work as disavowing the more general point “that we must look beyond the specific views of the framers to apply the Constitution to contemporary problems.”<sup>174</sup>

As for Amar, he proclaims himself an eclectic who accepts the legitimacy of textual, historical, structural, prudential, doctrinal, and ethical forms of argument in constitutional interpretation.<sup>175</sup> Moreover, read as a whole, *The Bill of Rights*—the book in which Amar sets forth his narrative of the Reconstruction-era

*Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995) (relying on the federal Bill of Attainder Clause).

171. For an excellent summary, see Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2337-43 (1995) (reviewing OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* (1993)). For a revisionist account, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). For a response, see Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

172. See RONALD DWORKIN, *FREEDOM'S LAW, THE MORAL READING OF THE AMERICAN CONSTITUTION* 271 (1996).

173. *TRIBE & DORF, supra* note 66, at 11.

174. *Id.* at 13.

175. See Amar, *supra* note 170, at 754-55 (employing the categories found in PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982)). Amar identifies yet another category, which he calls “intratextualism.” *Id.* at 748.

transformation of the Second Amendment and the Bill of Rights more generally—does not claim that the transformation was completed upon the enactment of the Fourteenth Amendment. For example, his discussion of the First Amendment explains how modern Supreme Court doctrine could be supported by drawing upon historical analogies to Reconstruction,<sup>176</sup> but he certainly does not argue that the framers and ratifiers of the Fourteenth Amendment understood it to enact modern First Amendment doctrine as such. Moreover, when Amar turns to drawing broad lessons, his goal seems to be primarily to set the record straight—to replace the mistaken notion that we inherited our freedoms directly from the founding with a more accurate picture that celebrates the role of Reconstruction Republicans.<sup>177</sup>

Setting the record straight about the historical origins of our freedoms need not entail interpreting the Constitution in a narrowly originalist fashion. Amar and Tribe could be right that by 1868 the background understanding of arms-bearing had evolved to the point where a private right of gun ownership was generally thought to be among the privileges and immunities of national citizenship. But just as the original “Second Amendment did not enact the background understanding”<sup>178</sup> circa 1791, neither did the Fourteenth Amendment—the text of which does not expressly mention arms at all—enact the background understanding circa 1868.

## V. NORMATIVE CONSIDERATIONS

Our consideration of doctrine, text, structure, and history has not been value free. In trying to give coherence to case law or to draw lessons from historical experience, we have necessarily been engaged in a somewhat normative enterprise. In this Part, I consider normative arguments more directly. In doing so, I do not deny that there exists substantial disagreement about the questions under consideration. But the fact that some people will disagree with an argument is not a reason not to make the argument.

This Part first addresses the insurrectionist justification and then turns to a self-defense justification. It argues that some of the

176. See AMAR, *supra* note 65, at 243.

177. See *id.* at 293 (“If this book is right, then many of us are guilty of a kind of curiously selective ancestor worship—one that gives too much credit to James Madison and not enough to John Bingham, that celebrates Thomas Jefferson and Patrick Henry but slights Harriet Beecher Stowe and Frederick Douglass.”).

178. TRIBE & DORF, *supra* note 66, at 11.

normative disagreement about the desirability of an individual right to own firearms turns out to be empirical disagreement about the likely consequences of gun control versus those of an armed population. To the extent that more purely normative arguments support some individual right of arms, the right they support does not closely track the standard individual right interpretation of the Second Amendment.

### A. *Insurrection*

The insurrectionist argument for an individual right to own firearms is by now familiar. An armed populace, the argument goes, will be able to resist a tyrannical government. Indeed, the mere fact that the people have arms will deter would-be tyrants from seizing the reins of government for oppressive purposes.

There is a nonconsequentialist and a consequentialist form of this argument. The nonconsequentialist form links the people's right to arms with self-government. In the natural law language of the Declaration of Independence, governments derive "their just powers from the consent of the governed, [and] whenever any Form of Government becomes destructive of [humans' unalienable rights], it is the Right of the People to alter or to abolish it."<sup>179</sup> Yet if the right of rebellion is understood in nonconsequentialist terms, it would seem to inhere not in individuals but in political communities. Individuals may have a right to *participate* in self-government, but only the people in a collective capacity have a right of self-government as such. Thus, the nonconsequentialist claim that self-government entails a right to alter (or restore) the form of government by force cannot by itself justify an individual right to arms.

Notice I do not say that one could not posit a nonconsequentialist individual right to use force against tyrannical exercises of government authority. One might think that individuals have a right to own firearms so that any time the government attempted to violate their rights, they could resist or threaten resistance with force. But while such a radically libertarian, indeed positively anarchistic, view would be internally consistent, it is not the standard insurrectionist account. In the standard account, the armed population stands ready to defend the political community as a whole against tyrants, not to defend every member of the community against

179. THE DECLARATION OF INDEPENDENCE, *supra* note 89, at 37.



every possible violation of rights.

Nonetheless, one might still invoke notions of self-government to justify an individual right to own arms. It could be argued that an individual right to own arms provides the people in their collective capacity with the means to resist or deter tyranny. This is a consequentialist or empirical rather than a nonconsequentialist claim. It asserts that an individual right to own arms will aid in the preservation of democracy.

Is the empirical claim true? Widespread individual ownership of and skill in using firearms arguably increase a nation's ability to resist foreign armies and thus deter foreign attack. It is possible to draw such a lesson from the experience of Soviet forces in Afghanistan, although for much of the occupation, the mujahideen received sophisticated military equipment from the West and the Islamic world.<sup>180</sup> But even granting that it is, *ceteris paribus*, more difficult for an invading force to subdue an armed population than an unarmed one, it is simply fantastic to suppose that a power bent on occupying the United States would be undeterred by our conventional and nuclear military forces, yet given pause by the prospect of resistance from individuals. The twenty-first-century American insurrectionist claim for arms therefore must rest on an argument about their utility in resisting tyranny by our own government.

Does an individual right to own arms in fact aid in the preservation of democracy against threats by a nation's own leaders? Certainly we can imagine circumstances in which the answer would be yes. Imagine a fledgling democracy in which there is reason to fear the despotic tendencies of the highest elected official. The knowledge that people demonstrating against one of the would-be despot's policies are armed might well cause him to pause before ordering his troops to march against the demonstrators. Then again, one might conclude that even if such scenarios are possible, a heavily armed populace itself poses risks to democracy. It is a striking fact that none of the constitutions written since the fall of communism—under circumstances in which fears of reversion to dictatorship were hardly fantastic—contains a provision explicitly protecting a right of arms.<sup>181</sup>

180. For a response to similar, and similarly exaggerated, claims about the power of armed individuals to resist foreign invaders in the context of the experience of the United States in Vietnam, see WILLS, *supra* note 90, at 25-26.

181. Construing the United States Constitution to confer a robust individual right of gun ownership would, to my knowledge, render it unique. Even in Switzerland, where there is a tradition of universal military service and private gun ownership, the constitution contains no such right. See SWITZ. CONST. art. 7-36 (French version 1999) (visited Jan. 12, 2000)

Moreover, even if one believes that a private right of gun ownership is valuable in a new democracy, in a mature democracy, like the United States, other rights—especially the right of free speech—perform the day-to-day task of ensuring that the government serves the people. Above I suggested that robust judicial protection for an individual right of gun ownership could undermine protection for freedom of speech because it would problematize the line between abstract advocacy and dangerous conduct.<sup>182</sup> It might also be thought that, to the extent that widely available guns contribute to crime, they trigger aggressive policing tactics that undermine Fourth Amendment liberties, as well as policies of mass incarceration that sit uncomfortably with the ideals of a free society.

In short, if the Second Amendment ever did protect an individual right to gun ownership for insurrectionist reasons, the desuetude into which that right has apparently fallen may reflect more than just archaic language. I am suggesting that whatever democracy-reinforcing effects a private right to own firearms may be thought to have tend to decay over time. As the democracy matures, the risk that a tyrant will seize the reins of government diminishes, and the threats to liberty come from more mundane abuses. In such times, robust protection for a private right to own firearms actually may impede robust protection for the civil and political rights needed to guard against such mundane but hardly trivial abuses.

There is no guarantee that even a mature democracy such as our own will not give way to tyranny. The hypothesis that any given society will be better able to preserve its democracy without an individual right to firearms than it can with one cannot be proven in any strict sense. Nonetheless, the factors identified above suggest that this is the safer bet. Although there are recent examples of democracy giving way to military rule in our own hemisphere, typically it was the existence of armed revolutionaries or the perceived threat of disorder that was used as a justification for the coup. It is therefore quite possible that a formal right of firearms ownership would have only increased the frequency of these occurrences. In any event, the fragility of Latin American democracy in the twentieth century seems much more a product of weak traditions of civilian control over the military than a product of the status of firearms rights.

<[www.admin.ch/ch/f/rs/101/index.html](http://www.admin.ch/ch/f/rs/101/index.html)> (setting forth other fundamental rights).

182. See *supra* text accompanying notes 143-48.

In evaluating the likely costs and benefits that an individual right to firearms ownership would confer on democracy, we make a complicated prediction in the face of considerable uncertainty. I have offered some reasons to think that a robust individual right to own firearms is unnecessary to, and may actually impede the chances for, the survival of our democracy.

### *B. Self-Defense*

Self-defense provides a considerably stronger justification for a right of firearms ownership than does the threat of insurrection against tyranny. Even if the government provides police protection, some acts of private violence will occur. Should innocent, otherwise law-abiding citizens have the right to own firearms to protect themselves in the event that they are the targets of such private violence?

The most common argument for most forms of gun control—from laws prohibiting the carrying of concealed weapons, to those requiring trigger locks, even to near-complete bans on possession—is that firearms possession does not make for greater safety but actually increases the risk of injury or death. A (hand)gun obtained for defense against felons has a greater chance, gun control advocates say, of being used opportunistically against a family member or discharging accidentally.<sup>183</sup> Others contest these claims. They argue that accidental firearms deaths are rare,<sup>184</sup> and that widespread firearm ownership reduces (or at least does not increase) violent crime because criminals are deterred by the risk to themselves if they attack armed law-abiding citizens.<sup>185</sup> Still others point to the unreliability of the data used to support the safety-enhancing effects of gun ownership.<sup>186</sup>

183. Here is a typical claim taken from the Violence Policy Center's Web site: "For every time a gun in the home is used in a self-defense homicide, a gun will be used in—1.3 unintentional deaths[;] 4.6 criminal homicides[; and] 37 suicides." <[http://www.vpc.org/fact\\_sht/hgbans.htm](http://www.vpc.org/fact_sht/hgbans.htm)> (visited Feb. 18, 2000) (citing A.L. Kellermann & D.T. Reay, *Protection or Peril? An Analysis of Firearm-Related Deaths in the Home*, 314 (24) NEW ENG. J. MED. 1557 (1986)).

184. See KLECK, *supra* note 12, at 304 ("The risk of a gun accident is extremely low, even among defensive gun owners, except among a very small, identifiably high-risk subset of the population.").

185. See *id.* at 203 ("[T]he assumption that general gun availability positively affects the frequency or average seriousness of violent crimes is not supported."); JOHN R. LOTT, MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 19 (1998) ("Allowing citizens to carry concealed handguns reduces violent crimes.").

186. See, e.g., Otis Dudley Duncan, *Gun Use Surveys: In Numbers We Trust?*, CRIMINOLOGIST Jan./Feb. 2000, at 1, 5 ("[T]he three largest, most comprehensive, and

The complicated empirical and policy judgments required to sort out these conflicting claims seem best suited to legislative or perhaps administrative judgment. There is no reason to think that the legislative process currently excludes the perspectives of those who oppose various forms of firearm regulation. Indeed, whatever its precise strength, the fact that the “gun lobby” is widely recognized as wielding substantial legislative influence indicates that, unlike racial minorities for example, gun control opponents cannot be characterized as the victims of a process failure.<sup>187</sup>

However, those who support gun rights contend that because gun control laws limit a constitutional right, the burden of persuasion rests with the government.<sup>188</sup> If we accept their premise, the point is largely correct. Although we can imagine a regime in which a right to firearms coexists with extensive regulation—indeed, that appears to be a fairly apt description of the colonial and founding eras<sup>189</sup>—under modern doctrine, the recognition of a constitutional right typically means that the government bears the burden of persuading a court that the regulation is necessary.

Yet the premise of the gun advocates’ argument begs the central question of whether there is a constitutional right to gun ownership. If constitutional text, structure, history, and doctrine led us to conclude that, *ceteris paribus*, there is a Second Amendment right to own firearms for self-defense, then the persuasion burden would fall on those who sought to limit that right. But our inquiry to this point does not establish such a right, and we have turned to normative arguments to see whether they provide a clear basis for inferring one. Therefore, the persuasion burden does not fall on those who would limit rights of gun ownership, and absent a contrary showing,<sup>190</sup>

technically most sophisticated surveys in this domain are unanimous in being radically inconsistent with Lott’s claim that 98% of defenders ‘merely brandish’ their weapons.”).

187. See generally ELY, *supra* note 19 at 21 (arguing that the Court acts most legitimately in setting aside the results of majoritarian politics when the Court acts to compensate for a systematic defect in the political process). Ely’s theory was strongly rooted in prior practice, see, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938), and has been influential since he articulated it. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 n.10 (1985).

188. See, e.g., Powe, *supra* note 8, at 1392 (“If the [Second] Amendment has substance, then it creates presumptions that tilt the debate.”).

189. See *supra* note 118.

190. Under conventional constitutional criteria, even utterly compelling evidence that gun ownership increased safety would not count as a sufficient reason to recognize a constitutional right of gun ownership, but in my view, to the extent permitted by institutional limitations, such pragmatic and empirical issues should play a somewhat larger explicit role in constitutional adjudication than they currently play. See Dorf, *supra* note 48, at 56 (“The Court could rely to a

lawmakers are entitled to infer that there is some causal relation between the widespread availability of firearms in the United States and the significantly higher rates of gun violence here than in otherwise similar countries that regulate firearms more strictly.<sup>191</sup>

Still, the question of whether there should be a right to own or possess firearms is not simply a matter of calculating the likely consequences of such a right. If we say that legislatures are justified in enacting gun control measures on the ground that, on the whole, these laws increase personal security, the deontologist will object to the sacrifice of some individuals' right of personal security. If owning a firearm makes one individual safer, that individual claims, the government cannot prohibit such ownership for the benefit of others. This argument resembles Ronald Dworkin's familiar claim that rights may not be overridden based on a calculation of costs and benefits,<sup>192</sup> but as we shall see, the claim fails to establish a Second Amendment right of armed self-defense.<sup>193</sup>

greater extent on empirical and policy analysis in its written opinions.").

191. See, e.g., Martin Killias, *International Correlations Between Gun Ownership and Rates of Homicide and Suicide*, reprinted in 148 CAN. MED. ASSOC. J. 1721 (1993) (finding a positive correlation between gun ownership rates, on the one hand, and suicide and homicide rates, on the other). The most relevant "control" country for a natural experiment would seem to be Canada. One comparative study concluded that the data "emphatically show that Canadian gun control, especially the provisions pertaining to handguns, does have the beneficial effect of saving lives." Catherine F. Sproule & Deborah J. Kennet, *Killing with Guns in the USA and Canada 1977-1983: Further Evidence for the Effectiveness of Gun Control*, 31 CAN. J. CRIM. 245, 249 (1989). This conclusion can be contested on the basis of its relatively short period of investigation. See Robert J. Mundt, *Gun Control and Rates of Firearms Violence in Canada and the United States*, 32 CAN. J. CRIM. 137, 139 (1990). However, whatever one ultimately concludes about the complicated questions of causation, the statistical disparities are certainly suggestive. The United States has consistently higher rates of firearms and (especially) handgun possession than Canada, consistently higher rates of crime, and consistently higher percentages of violent crimes committed with firearms and handguns. See *id.* at 141-43, 145, 149. Similar correlations appear when one compares firearms ownership and gun violence statistics from other industrialized countries. See Martin Killias, *International Correlations Between Gun Ownership and Rates of Homicide and Suicide*, 148 (10) CAN. MED. ASSOC. J. 1721 (1993) (examining 1989 survey data from 14 countries).

192. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 193 ("[T]he prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do.").

193. I put aside the objection that in constitutional law, rights are not actually trumps. See Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 155-56 (1997) (reviewing DWORKIN, *supra* note 172 and DENNIS PATTERSON, *LAW AND TRUTH* (1996)); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998) ("Rights are not general trumps against appeals to the common good or anything else; instead, they are better understood as channeling the kinds of reasons government can invoke when it acts in certain arenas."). To meet that objection, an advocate of the individual right interpretation of the Second Amendment could recast the trumping claim as a demand that the government satisfy some form of heightened scrutiny. See *id.*; Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429-31 (1993) (proposing that rights be viewed as shields rather than trumps and arguing that rights are not trumps on the quite different ground that rights serve

Consider three schematic cases. *A* believes that her ownership of a firearm makes her substantially safer while increasing the risk of injury or death of innocent third parties at most marginally. Perhaps *A* believes that it even makes innocent third parties, in the aggregate, safer. In fact, however, *A*'s ownership of a firearm increases the risk of death or injury to herself as well as to innocent third parties. *B*'s ownership of a firearm increases the risk of death or injury to innocent third parties to a greater degree than it increases her own safety, but it does increase her own safety somewhat. *C*'s ownership of a firearm makes her substantially safer while increasing the risk of injury or death of innocent third parties at most marginally. Perhaps it even makes innocent third parties, in the aggregate, safer.

*A* presents the weakest claim for a right to firearms ownership. Some constitutional rights are best understood as protecting decisional autonomy, and are in this sense rights to be wrong. For example, even if we knew to a certainty that, contrary to the expectations of a pair of lovers, their marriage would prove to be a source of nothing but misery to them, we would not grant the government the power to prevent them from marrying one another. Part of what makes the decision whether to marry or to have children valuable is that it is one's own decision.<sup>194</sup> One could conceive of a right to safety in these terms—as a right to *decide* whether and how to protect oneself against private violence—but the right then loses most of its moral force. *A* is entitled to hold all manner of beliefs, but when acting on those beliefs risks serious physical harm to *A* and others, something more than the fact that *A* holds a belief is needed to prevent the government from intervening.

*B* has a stronger claim than *A*. Nevertheless, *B*'s claim runs into the harm principle.<sup>195</sup> Her proposed conduct harms third parties, thereby making it a poor candidate for a right. Moreover, why should the government prefer *B*'s claim to personal safety over those of third parties when the latter are, by hypothesis, stronger?

*B* might say that her claim is a composite of safety and liberty: in the interest of third parties, the government proposes not only to

expressive functions not captured by the standard account or its competitors).

194. See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (stating that some beliefs "relating to marriage, procreation, contraception, family relationships, child rearing, and education" are so fundamental "to personal dignity and autonomy" that they "could not define the attributes of personhood were they formed under compulsion of the State").

195. See 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* at ix-xx, 318-38 (1988).

decrease her safety but also to limit her freedom to own a firearm. Phrased in this way, it looks as if the government is singling out *B* for a burden, the benefit of which it confers on others. Yet it should be recalled that the law imposes the reciprocal burden on all. The third parties whose safety the gun control law enhances will also have their own freedom to own firearms restricted. Thus, unless the aspect of *B*'s freedom that is limited is itself highly prized—and this is the very issue in dispute—the safety interests of the third parties will justifiably outweigh the combination of *B*'s safety claim plus her liberty claim.

*C* presents a strong claim because the reduction in *C*'s safety (and freedom) carries no substantial compensating benefit for *C* or others. The main problem with *C*'s claim is the difficulty, *ex ante*, of distinguishing *C* from *A* (or *B*). Nearly everyone who claims a right to own firearms will believe that she is a *C*, or at worst, a *B*.<sup>196</sup> At the very least, this suggests that the government may legitimately require trigger locks, safety education, and similar measures as a condition of firearm ownership licensing, thereby weeding out *A*'s and converting some of them into *C*'s. But even these measures will not be deemed sufficient if the government has a reasonable basis to conclude that firearms possession by properly certified individuals on the whole increases the risk of death or injury—because accidents still happen, because the firearm remains available to otherwise cautious people should they become enraged, and because criminals who have a substantial reason to believe their victims are armed may more readily resort to violence themselves.<sup>197</sup>

*Ex post*, matters may look somewhat different. Imagine that the government bans firearm possession, but *C* (who really is a *C*) decides to carry a weapon nonetheless. If *C* uses the firearm in justifiable self-defense, should *C* have a necessity defense to a charge of illegal possession? *C* might say that any basis for thinking she was really an *A* is removed by the facts of her case. However, to give *C* such a defense would rob the general prohibition of most of its deterrent effect. Many *A*'s, thinking themselves *C*'s, will reason that they can safely violate the possession prohibition because their violation would

196. Cf. SHELLEY E. TAYLOR, POSITIVE ILLUSIONS: CREATIVE SELF-DECEPTION AND THE HEALTHY MIND 10-11 (1990) (reporting that ninety percent of people surveyed rated themselves as above average drivers); Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 SCI. 1232 (1989) (reporting similarly optimistic assessment of personal risks).

197. I do not contend that any of these claims is true—only that they are sufficiently uncertain that lawmakers may take them to be true.

likely only come to light in the event that they use the firearm, and because they (erroneously) believe they would only use the firearm justifiably, they reason that they could not be prosecuted. Thus, if we conclude that the difficulty of distinguishing *A*'s from *C*'s *ex ante* justifies prohibiting firearm possession even by *C*'s, we would likely also conclude that that in order to be able to enforce the prohibition, we must disallow a necessity defense by *C*.<sup>198</sup>

This result may seem somewhat harsh, and I admit that I am not entirely comfortable with it. We justified a reduction in *B*'s safety on the ground that *B* was endangering third parties. *C*, by contrast, does not endanger third parties. How can the harmful effects of *A*'s conduct justify a limit on *C*'s ability to protect herself from attack? There is no good answer to this question other than to say that sometimes the good of the community justifies imposing general burdens that are irreducibly imprecise.

Even if we find this response unconvincing, it is worth pausing to notice that the normative arguments we have considered for some limited right of armed self-defense do not track the Second Amendment at all closely. There is the initial problem of grafting a self-defense justification onto a text that speaks in what appear now, and were understood at the founding, to be military terms. In addition, a right to own or possess firearms is at most an indirect means of protecting the right of personal security. If the latter can be protected as or nearly as effectively by other means—such as police protection or nonlethal weapons—the argument for a right to firearms is accordingly weaker.

Finally, there is the problem that the self-defense argument hardly justifies a right to own or possess firearms for all of “the people.” At most, the arguments considered justify exemptions from general prohibitions for some particular individuals in particular circumstances.<sup>199</sup> The question of who, if anyone, should be entitled to a right to own, possess, or use firearms, and under what circumstances, raises difficult issues of substantive criminal law. To the extent that these are also issues of constitutional law, they are

198. However, we should still allow *A* to plead self-defense to the substantive crime with which she might be charged. Even if *A* committed a *malum prohibitum* by obtaining the firearm in the first place, once she was under attack she was entitled to use reasonable force to defend herself. Cf. GEORGE FLETCHER, *A CRIME OF SELF-DEFENSE* (1988).

199. But cf. *United States v. Gomez*, 92 F.3d 770, 774 (9th Cir. 1996) (Kozinski, J., concurring) (relying on the Second Amendment as a source for a justification defense to a weapons charge).



probably better analyzed under the Due Process Clauses of the Fifth and Fourteenth Amendments than by attempting to shoehorn them into the Second Amendment.<sup>200</sup>

## VI. IS THE SECOND AMENDMENT AN ANACHRONISM?

A recent article by Stephen Halbrook and David Kopel accuses critics of the individual right interpretation of adopting a “‘nihilist theory’ of the Second Amendment.”<sup>201</sup> The Amendment must do *something*, they say; otherwise there was no need to bother adding it. To the extent that Halbrook and Kopel issue a historical challenge, we have a plausible answer: the framers and ratifiers of the Second Amendment were principally worried about a standing federal army. By protecting state militias against abolition they hoped to reduce federal reliance on a standing army and, in the event of federal tyranny by a standing army, to provide the states with the means to resist.<sup>202</sup> This response may seem less than fully satisfactory because we do not share the founders’ distrust of standing armies or their faith in militias. Our national defense now rests almost entirely with federal forces and, after the Civil War, the notion of an armed clash between the federal government and some number of states is understood not as our last defense against tyranny but as the paradigmatic national catastrophe. Thus, the *something* that the Second Amendment accomplished at the founding looks now like a nothing. To avoid rendering the Second Amendment a modern nullity, the Halbrook/Kopel argument implies, we should adopt the individual right interpretation—even if that is ahistorical.

However, it is decidedly not true that preserving state militias against federal abolition serves *no* modern purpose. To be sure,

200. This is not to say that the Court is likely to use any of these provisions to infer a personal right of armed self defense given what Laurence Tribe aptly calls its “normative double standard.” Laurence H. Tribe, *Comment: Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 158 (1999).

The Court allows rights that help fill out the constitutional landscape [of federal-state relations] to be derived by structural inference from the borders and lines of authority that map that landscape. However, it paradoxically proceeds as though rights that are valued in themselves as constitutive elements of the human personality in a non-totalitarian regime may not be similarly derived; rather, these individual rights must be located, if at all, only in specific text or tradition.

*Id.*

201. Halbrook & Kopel, *supra* note 125, at 351.

202. Cf. SPITZER, *supra* note 32, at 27 (stating that the Second Amendment’s original “aim was to ensure the continued existence of state militias as a military and political counterbalance to the national army, and more broadly to national power”).

giving full effect to the spirit of the Second Amendment would potentially require overruling the *Selective Draft Law Cases*,<sup>203</sup> which upheld Congress's authority to incorporate National Guard and National Guard Reserve troops into the regular army. But those cases are fully consistent with the letter of the Second Amendment as I have explained it: relying on the militia clauses but not the Second Amendment, the Court said that even though Congress might choose to incorporate militia members into the national army, its power to train and discipline the militia would, in general, obviate "the necessity for exercising the army power."<sup>204</sup> The Second Amendment still reinforces this idea, just as the Tenth Amendment reinforces the notion of enumerated powers of Article I.

This last suggestion also provides a response to the charge that interpreting the Second Amendment merely to preserve state militias renders it redundant with the militia provisions of Articles I and II. The response is: so what? There is in fact no interpretive canon requiring that every constitutional provision have some effect not attributable to some other provision. For example, under the Supreme Court's modern interpretation of the Commerce Clause, Congress may regulate intra-state economic activity that has a substantial effect on interstate commerce.<sup>205</sup> Under that test, many of the powers articulated elsewhere in Article I are unnecessary. Among the provisions rendered surplusage by the modern interpretation of the Commerce Clause are the power: "To establish . . . uniform Laws on the subject of Bankruptcies";<sup>206</sup> "[t]o Coin Money";<sup>207</sup> "[t]o provide for the Punishment of counterfeiting";<sup>208</sup> and to issue copyrights and patents.<sup>209</sup> It was just this redundancy that led Justice Thomas, concurring in *United States v. Lopez*,<sup>210</sup> to complain that the Court's interpretation of the Commerce Clause warranted reexamination.<sup>211</sup> None of his colleagues took the offer seriously. Thus, on the question that was most

203. 245 U.S. 366 (1918).

204. *Id.* at 383.

205. See *United States v. Lopez*, 514 U.S. 549, 560 (1995) (invalidating the Gun Free School Zones Act in part because firearm possession is not "economic activity," while reaffirming *Wickard v. Filburn*, 317 U.S. 111 (1942)).

206. U.S. CONST. art. I, § 8, cl. 4.

207. *Id.* cl. 5.

208. *Id.* cl. 6.

209. See *id.* cl. 8.

210. 514 U.S. 549 (1995).

211. See *id.* at 587 (Thomas, J., concurring).

central to the debate over ratification of the Constitution—the scope of Congress’s enumerated powers—we find that whole clauses have been rendered superfluous by the modern understanding.

There are additional examples of constitutional provisions that have been rendered superfluous by expansive interpretation of other provisions or changed circumstances. Congress’s power to “grant Letters of Marque and Reprisal”<sup>212</sup> was rendered useless by the 1856 Declaration of Paris (even if in principle the United States could renounce the Declaration).<sup>213</sup> The limitation of the Seventh Amendment’s guarantee of a civil jury trial right to cases in which the amount in controversy exceeds “twenty dollars” has been entirely eaten away by inflation.<sup>214</sup> And given the Supreme Court’s ruling that the Free Exercise Clause prohibits discriminatory but not nondiscriminatory burdens on religion,<sup>215</sup> it is not clear that the Free Exercise Clause adds anything to the Establishment Clause and the Equal Protection Clause (or in the case of the federal government, the equal protection component of the Fifth Amendment Due Process Clause).<sup>216</sup>

Even if we disagree with the particulars of any of these developments—perhaps we think the Seventh Amendment has earned a cost of living adjustment—the more general phenomenon makes perfect sense. The Constitution is not the work of an omniscient deity who foresaw all future developments and chose only those words that were indispensable for all circumstances.<sup>217</sup>

212. U.S. CONST. art. I, § 8, cl. 11.

213. See BLACK’S LAW DICTIONARY 814 (5th ed. 1979).

214. It might be objected that the erosion of the twenty-dollar limit has worked an expansion of the Seventh Amendment, while the erosion of the Second Amendment (if that is what has occurred) worked a contraction of rights. However, other doctrinal changes have eroded the Seventh Amendment itself. The most prominent is the acceptance in modern times of means for taking cases away from the jury that were not available in 1791. See *Galloway v. United States*, 319 U.S. 372, 405-7 (1943) (Black, J., dissenting) (disapproving the erosion of the civil jury’s prerogative). In any event, my next example also involves the erosion of a right, and the expansion of the Commerce Clause worked an erosion of a limitation on government, which, for some purposes, is the equivalent of the erosion of a right.

215. See *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990).

216. For a theory of the Free Exercise Clause that may give it some independent bite notwithstanding *Smith*, see Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

217. Christopher Eisgruber aptly describes the “aesthetic fallacy.” See Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1617 (1997). “People in the grip of this fallacy suppose that the Constitution is like a poem, a symphony, or a great work of political philosophy. Each word and every phrase must come together to form a harmonious and pleasing composition.” *Id.*

Furthermore, because it is phrased in general language and so very difficult to amend, its interpretation calls for some degree of flexibility.<sup>218</sup> It should hardly surprise us that over the course of more than two centuries, some provisions of the Constitution faded in importance or were rendered redundant by the sensible expansive interpretation of others. Certainly the Second Amendment's fate has hardly been unique in this respect.

In my view, there remains one minor difficulty with interpreting the Second Amendment solely to preserve state militias: even if we reject the view that the "militia" is now synonymous with "the people," and even if "the people" as understood in the late eighteenth century were understood as not exactly collective or individual in the way we use those terms today, the individual right scholars who argue that the term "the people" *now* generally means individuals make a legitimate point. Perhaps we should try to understand the Second Amendment as preserving *some* individual right. However, engaging in this exercise in creative anachronism hardly compels *the* individual right to own and possess firearms.

One possibility we considered in the previous Part would be to recognize a limited right of armed self-defense. I noted above the awkward fit between the scope of the right that might be justified and the Second Amendment's reference to all of "the people." We might remedy that problem by emphasizing the militia's original role as a primitive police force: perhaps the right that inheres in all of the people is, contrary to the thrust of *DeShaney v. Winnebago County*,<sup>219</sup> a right to adequate police protection. The issue is hardly hypothetical. Minority communities have long complained that the police provide them with inadequate protection.<sup>220</sup> Of course, a right of self-help against private violence would not address the related problem of abusive treatment of racial minorities by the police themselves. Borrowing a page from the broad notion of "self-defense" favored by the Black Panther Party, one might think that the solution to this problem is also private arms, but this view sounds

218. The argument is borrowed, of course, from *McCulloch v. Maryland*, 17 U.S. 316 (1819).

219. 489 U.S. 189 (1989).

220. Even if, for institutional competence reasons, such a positive right could not be fully enforced by the judiciary, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419 (1993), its denial might serve as the predicate for some forms of self-help—although this too would call for difficult judicial assessments of when police protection was so inadequate to justify self-help.

dangerously similar to a private right of insurrection; reforms of police practices would seem a much more appropriate course.<sup>221</sup>

A second possibility would be to recognize a right of law-abiding citizens, upon successful completion of a safety course, to own or possess a small number of long-barreled guns.<sup>222</sup> As Wills notes, pistols were virtually unknown at the founding, except for dueling by aristocrats.<sup>223</sup> Merging narrowly understood history with the narrow letter of *Miller*, we might say that the Second Amendment protects a right to guns similar to those that were deemed useful to the militia at the founding.

A long-guns-only interpretation would have two pragmatic virtues as well. First, it would not threaten hunters, an important political constituency. Second, a distinction between long guns and handguns may make policy sense. Although handguns comprise roughly one-third of all firearms in the United States, they account for over three-fourths of firearm homicides, and more than half of all homicides.<sup>224</sup> An effective ban on handguns would undoubtedly shift some gun violence from handguns to other weapons, but some substantial reduction in total violence would probably result.

Both of the foregoing proposals—a limited right of self-defense and a limited right to own or possess long guns—lack any direct connection to the military focus of the Second Amendment. My final proposal would address that deficiency. Even if we do not share the founders' skepticism of standing armies, we may well sympathize with the ideal of the citizen-soldier in the following sense: we are rightly concerned by large gaps between martial and civilian values. Nuremberg and My Lai teach that, notwithstanding the importance of military discipline, the duty to follow orders does not excuse members of the armed services of their duty to follow minimal rules of human decency. The Iran Contra affair provides a warning about how ready military officials may be to execute policy contrary to law if they are convinced that the civil authorities will turn a blind eye. The ideal of

221. See generally Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

222. Cf. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 123 (1987) (distinguishing handguns from long guns based on their utility in fighting a standing army).

223. See WILLS, *supra* note 90, at 30-31.

224. The ratio of handguns to total guns was reported in 1991. See *How Many Guns?*, ATF NEWS RELEASE FY-91-36. The homicide numbers have been consistent from 1990 through 1997 (the most recent year available), except that in 1990 handguns accounted for slightly less than half of all homicides. See *Bureau of Justice Statistics, Homicide Trends in the United States* (visited Jan. 9, 2000) <<http://www.ojp.usdoj.gov/bjs/homicide/weapons.txt>>.

a citizen-soldier in the sense of a service member who is both of the people and subject to civilian control is thus very much a modern ideal.

And how does the Second Amendment speak to this ideal in modern times? By providing a right of the people to keep and bear arms—that is, a right to serve in the military. Of course the government need not accept anyone who wishes to serve in the military. Exclusions based on physical fitness, military need, criminal record, and so forth, would be perfectly appropriate. But wholesale exclusions based on stereotypical assumptions would not be consistent with the ideal of armed forces drawn from “the people.” On this reading, the most substantial effect of the Second Amendment today would be to invalidate official military discrimination on the basis of sex and sexual orientation.<sup>225</sup>

This proposal is not nearly as odd as it at first appears. Its great virtue is its synthesis of the founding and Reconstruction *as those periods are now understood*. Recall Amar’s contention that the Second Amendment means today what it meant circa 1868.<sup>226</sup> His approach depends not only on saddling us with Reconstruction-era views about arms-bearing, but also relies on the old distinction between civil and political rights, which Amar aptly characterizes as dividing people into “First Class Citizens” and “members of the larger society.”<sup>227</sup> However, even if those who framed and ratified the Reconstruction Amendments still thought in these terms, in our times the central meaning of those amendments is that there can be no division of citizens into classes.<sup>228</sup> The idea that “[t]here is no caste here”<sup>229</sup> has become a fixed star in our constitutional constellation.<sup>230</sup>

Understanding the core meaning of the Reconstruction Amendments in these terms also explains how the Second

225. See Balkin, *supra* note 60, at 1718-19; Carl Riehl, *Uncle Sam Has to Want You: The Right of Gay Men and Lesbians (and All Other Americans) to Bear Arms in the Military*, 26 RUTGERS L.J. 343 (1995).

226. Note that Amar also proposes reading the Second Amendment to constrain sex and sexual orientation discrimination in the military. See Amar, *supra* note 161, at 26-27. Like me, Amar puts forward this proposal hesitantly, although while I offer it as a possible alternative to an individual right to armed self-defense, Amar appears to offer it as a supplement to such a right. See *id.* at 27.

227. AMAR, *supra* note 65, at 48.

228. I say citizens and not people because we do permit restrictions on voting and jury service by noncitizens.

229. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

230. How to interpret the anticaste principle remains controversial in some contexts, of course, so that Justice Harlan’s next line, “Our Constitution is color-blind,” *id.*, is hotly contested.

Amendment could be read to speak to the composition of federal forces and not just state militias. It is not just that the operative clause makes no reference to state as opposed to federal forces. The anticaste principle has become so central to our *modern* understanding of the entire Constitution that it infuses the whole.<sup>231</sup>

To be sure, none of these alternative readings is clearly superior to viewing the Second Amendment as simply a limit on Congress's ability to abolish state militias. The alternatives are offered for those who believe—quite erroneously in my view—that every constitutional provision must play a substantial role in shaping the proper scope of government authority. As the last of my proposals shows, however, we should not assume that giving the Second Amendment bite necessarily means giving civilians guns.

### CONCLUSION

This Article has proceeded on the assumption that something important is at stake in the academic debate over how to interpret the Second Amendment. Yet most “contemporary gun control proposals, which by and large do not seek to ban all firearms, but seek only to prohibit a narrow type of weaponry (such as assault rifles) or to regulate gun ownership by means of waiting periods, registration, mandatory safety devices, or the like . . . are plainly constitutional,”<sup>232</sup> even under the individual right view of the Second Amendment. An originalist could find the justification for the contemporary proposals in analogous provisions in force during colonial times and at the time of the founding.<sup>233</sup> A doctrinalist would note that recognition of a constitutional right—whether to free speech or to the possession of firearms—can be limited if the limitation is necessary to further a compelling government interest such as public safety.<sup>234</sup>

Nevertheless, the debate over the scope of the Second Amendment is not merely an academic one. Even if modest gun control proposals are consistent with the individual right view of the

231. See *Romer v. Evans*, 517 U.S. 620, 623 (1996) (opening the opinion by noting that “[o]ne century ago, the first Justice Harlan admonished this Court that the Constitution neither knows nor tolerates classes among citizens”) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

232. See *TRIBE*, *supra* note 1, at 902.

233. See *id.* at 903.

234. See Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31 (stating that because “[a]lmost no right known to the Constitution is absolute and unlimited—not even the rights of free speech and religious exercise . . . [t]he right to bear arms is certainly subject to reasonable regulation in the interest of public safety.”).

Second Amendment, at some point, federal, state, or local lawmakers may conclude that a complete or near-complete ban on private possession of handguns is needed to reduce the level of violent crime in the United States to that of other industrialized nations. Such an immodest measure would be well-nigh impossible to justify if one accepted the conventional individual right view.

To be sure, the doctrinal solution would remain technically available: we could say that there is an individual right to possess firearms, but it must yield to the compelling interest in preventing violent crime. Yet if a compelling interest overrides a right in nearly every circumstance in which the right may be exercised, one might as well say that there is no right. One of the main arguments against finding in the Second Amendment an individual right to firearm possession is that such a right would endanger public safety. If a court were to find that, notwithstanding the threat to public safety, the Second Amendment protects an individual right to firearm possession, it is highly unlikely that the same court would go on to find a compelling interest that would justify strong gun control measures. Thus, it makes a great deal of practical difference whether or not the advocates of the individual right view prevail in the courts.

Should they so prevail? This Article has argued that, judged by the conventional criteria of constitutional adjudication, the case for a robust individual right to own firearms enforceable against either the federal or state governments has not been made. To be sure, this is not to say that the conventional criteria are correct. Critics of the Supreme Court abound. The most common criticism points to the “countermajoritarian difficulty,”<sup>235</sup> objecting to the Court’s power to nullify democratically chosen policies. Of course, that is not the complaint of the advocates of the individual right interpretation of the Second Amendment. In their view, the courts have been insufficiently countermajoritarian.

What infuriates the individual right scholars who oppose gun control—and embarrasses those who favor it—is their perception of a political double-standard. Even if we grant that the Second Amendment’s text does not unambiguously guarantee an individual right of firearm ownership and possession, they say, surely there is greater textual support for such a right than for other rights the Court has

235. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).



recognized, such as the right to contraception,<sup>236</sup> the right to abortion,<sup>237</sup> or the right of minor first cousins to live together with their grandmother.<sup>238</sup>

Note the understanding of constitutional interpretation implied by this criticism: surrounding the core of each textual provision are concentric circles of related values; if a right is recognized at some distance from the core, then *a fortiori*, all rights at lesser distances must be recognized as well. Thus, if contraception lies a distance *X* from the Fourth Amendment (and other provisions), recognition of a constitutional right to contraception implies recognition of a right of armed self-defense, provided that such a right lies a distance less than *X* from the Second Amendment.

Although this view of constitutional interpretation finds some superficial support in the Court's discussion of "penumbras" and "emanations" in *Griswold v. Connecticut*,<sup>239</sup> it is deeply flawed. The right to scream profane threats at passersby is arguably closer to the text of the First Amendment than is the right to publish on the Internet a statement of political support for a presidential candidate; the former is literally "speech," while the latter neither employs vocal chords nor a printing press. Yet no one would seriously argue that protection of the latter implies protection of the former. To the extent that talk of penumbras and emanations leads us to think that constitutional interpretation in hard cases is a matter of measuring the distance from the text, it is simply another unsuccessful effort to banish value judgments from constitutional interpretation.<sup>240</sup>

The existence of a large body of Supreme Court decisions recognizing constitutional rights that are not expressly articulated in

236. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

237. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

238. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

239. 381 U.S. at 484 (1965).

240. See DWORKIN, *supra* note 172, at 79-80 (challenging the conventional distinction between enumerated and unenumerated rights). Justice Stewart made a similar point about the *Griswold* Court's efforts to portray its ruling in strictly textualist terms in his concurrence in *Roe v. Wade*. He wrote:

*Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.

*Id.* at 167-68.

the text<sup>241</sup> means that we cannot rule out the individual right view of the Second Amendment on textual grounds alone. The champions of the individual right view are entitled to have their arguments heard. However, that does not mean that they are entitled to have their arguments accepted, unless, as judged by the admittedly somewhat value-laden criteria of constitutional interpretation, the arguments are convincing. As I have endeavored to show throughout this Article, on the whole these criteria point away from the individual right interpretation.

241. Although this body of opinions may be large, it does not appear to be growing, as the Court has retreated from its most expansive approach to substantive due process. It is, in effect, out of the business of recognizing previously unrecognized rights. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating that a substantive due process right will be recognized only if it is deeply rooted in history and tradition as well as implicit in the concept of ordered liberty) (citing *Moore*, 431 U.S. at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

